No. 3519

United States
Circuit Court of Appeals

For the Ninth Circuit.

DANIEL DE LA NUX, GEORGE F. DE LA NUX, and LAHAPA DE LA NUX,
Plaintiffs in Error,

vs.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

BILL FOR REFORMATION OF DEED.

$2.00 Stamp.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Plaintiff,

vs.

GEORGE DE LA NUX, Jr., and DANIEL DE LA NUX,
Defendants.

Bill of Complaint.

To the Honorable the Presiding Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, Sitting at Chambers, in Equity:

Your orator, Rebecca Houghtailing, appearing herein through and by Frederick E. Steere, the plaintiff above named, brings this her bill of complaint against the defendants above named, and thereupon your orator so appearing complains and alleges:

I.

That heretofore and on, to wit, the 12th day of April, A. D. 1916, it was duly and regularly adjudged by the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in a proceeding theretofore instituted for that purpose, that it was necessary that a guardian be appointed [1*] over the person and estate of your orator, Rebecca Houghtailing, and

*Page-number appearing at foot of page of original certified Transcript of Record.

that thereupon the said Frederick E. Steere was by said Court appointed guardian of the person and estate of the said Rebecca Houghtailing, and that thereupon letters of guardianship duly and regularly issued to the said Frederick E. Steere, who was duly and regularly appointed guardian of the person and estate of the said Rebecca Houghtailing.

II.

That thereafter and on, to wit, the 19th day of April, A. D. 1917, upon application duly and regularly made, the said Circuit Court of the First Judicial Circuit, Territory of Hawaii, did order and direct that the said Frederick E. Steere, as such guardian institute for and on behalf of your said orator a suit to set aside what purports to be a conveyance of certain property from the said Rebecca Houghtailing to George De La Nux Jr., and Daniel De La Nux, the said conveyance being hereinafter more fully referred to.

III.

That the said Frederick E. Steere duly qualified as such guardian, and has continued to act as such guardian, and still is such guardian.

IV.

That the said Rebecca Houghtailing has been all of her lifetime a resident of the Territory of Hawaii, and was and still is the owner of a very considerable amount of property, both real and personal, situated and located within the Territory of Hawaii, and that included within the property thus owned by her is certain real estate known as her homestead, which is situated and located on Kamehameha IV Road, in

Kalihi, Honolulu, Island of Oahu, Territory of Hawaii. [2]

V.

That the said Rebecca Houghtailing has a number of children and grandchildren residing within the said Territory of Hawaii, two of the said grandchildren being the defendants herein.

VI.

That the said Rebecca Houghtailing is an Hawaiian woman aged about 56 years; that she is without any knowledge whatsoever of business or business affairs; that at times she is unable to properly care for or manage her property interests; that for more than twenty years last past she has been addicted to over-indulgence in alcoholic liquors; that the only time within the last twenty years when the habit mentioned has not been indulged in has been when alcoholic liquors have not been obtainable by her; and that in consequence of her lack of knowledge of business and business affairs, and the habit hereinbefore referred to, it became necessary to have the said Frederick E. Steere appointed as guardian of her person and estate.

VII.

That some time prior to the 10th day of June, A. D. 1905, the son of your orator, one George F. De La Nux, who is the father of the said defendants, full well knowing the lack of knowledge of the said Rebecca Houghtailing of business and business affairs, and full well knowing the habit of the said Rebecca Houghtailing of over-indulgence in alcoholic liquors, and full well knowing that, owing to said lack of

knowledge and said habit, the said Rebecca Houghtailing would not be able to comprehend fully any action taken by her at a time when she had indulged in the use of intoxicating liquors to excess, importuned the said Rebecca Houghtailing to place the title to the homestead [3] hereinbefore referred to in the said defendants; that the said Rebecca Houghtailing being then and there desirous of pleasing the said George F. De La Nux, and being likewise desirous of vesting in these two grandchildren the title to the said homestead, reserving unto herself a life interest therein, did, in the year 1905, make known to the said George F. De La Nux her desire to so vest the title to said property; and that thereupon directions were given a scrivener to draft the deed necessary to carry out the said intention.

VIII.

That thereafter, and on the 10th day of June, A. D. 1905, and at a time while the said Rebecca Houghtailing was under the influence of liquor, there was presented to her for signature a deed of conveyance, a copy of which is hereto attached, incorporated herein by reference, and marked Exhibit "A." That upon the presentation of the said deed, the said Rebecca Houghtailing, in the presence of the father of the said defendants, the said George F. De La Nux, executed the same. That at the time of the executioin of the same, the said Rebecca Houghtailing relied upon the accuracy of the scrivener employed, and upon the good faith of the said George F. De La Nux; that at the time of the execution of the said deed, the said Rebecca Houghtailing, by

reason of her lack of knowledge of business and business affairs, and by reason of her over-indulgence in intoxicating liquors, with both of which the said George F. De La Nux was then and there well acquainted, was unable to comprehend the terms and conditions of the deed of conveyance which she then and there executed, but believed fully that the same constituted only a conveyance by her of the said homestead to her said grandchildren, reserving unto herself a life interest therein, and that at the time of the execution thereof it was only the intention of the said Rebecca Houghtailing to make a conveyance of the said homestead to the said [4] grandchildren, but reserving unto herself a life interest therein.

IX.

That notwithstanding the intention of the said Rebecca Houghtailing, as hereinbefore set forth, to make unto the said defendants a conveyance only of the said homestead, reserving unto herself a life interest therein, the said deed so executed by her did in truth and in fact contain a clause reciting that in addition to the said homestead the said Rebecca Houghtailing did further convey "also all and singular My Real and Personal property by me possessed and wheresoever situate," thus transferring in terms unto the said defendants not only the said homestead hereinbefore referred to, but all of the other property both real and personal, owned and possessed by the said Rebecca Houghtailing at the time of the execution of said deed.

X.

That the insertion of the said provision in said deed conveying property other than the said homestead was without the consent or knowledge, and was against the will of the said Rebecca Houghtailing, and was at the instigation, suggestion and connivance of the said George F. De La Nux, and was inserted therein with intent on the part of him, the said George F. De La Nux to deceive and defraud the said Rebecca Houghtailing, and with intent on the part of him, the said George F. De La Nux to have the said deed executed at a time when her condition, owing to the excessive use of intoxicating liquors, combined with her lack of knowledge of business and business affairs, would not permit her to appreciate the full force and effect of the instrument so to be executed by her; and that said instrument was executed at a time when the said Rebecca Houghtailing was under the influence of intoxicating liquors, and that in having the same executed at the said time, the said George F. De La Nux did intend to deceive and defraud the said Rebecca Houghtailing, [5] and did deceive and defraud her.

XI.

That at the time of the execution of the said instrument the said George F. De La Nux knew that it did not express the intent of the said Rebecca Houghtailing; knew that the said Rebecca Houghtailing did not intend to convey to the defendants property other than the homestead mentioned, and with the knowledge above set forth, assured the said Rebecca Houghtailing that *the said* did convey*ed* to

the said defendants nothing save the said homestead.

XII.

That thereafter, and upon discovery of the wrongful insertion, in the said deed of the provision above referred to, and of the fraud and deceit which had been practiced upon her, the said Rebecca Houghtailing made demand upon the said George F. De La Nux that steps be taken to have the said deed corrected and reformed, in order that the same should carry out the intent of the said Rebecca Houghtailing, but that the said George F. De La Nux refused so to do, basing his refusal, amongst other grounds, on the fact that the defendants herein were minors.

XIII.

That the said defendants herein are minors, the said George F. De La Nux, Jr., being of the age of about 15 years, and the said Daniel De La Nux being of the age of about 13 years.

XIV.

That by reason of the premises aforesaid the said [6] Rebecca Houghtailing is unable to dispose, during her lifetime through her guardian, of property other than the said homestead, all of which said property, both real and personal, is owned by her, and is prevented from making transfers of personal property, or proper conveyances of real estate other than the said homestead.

XV.

That the said Rebecca Houghtailing has no adequate remedy at law.

IN CONSIDERATION WHEREOF, and inasmuch as the said Rebecca Houghtailing has no suffi-

cient remedy at law, she, through her said guardian, prays as follows:

FIRST. That an order of the Court be entered, appointing some person to act as guardian *ad litem* for the said defendants, suggesting in this behalf that the father of said defendants, to wit, the said George F. De La Nux, be appointed such guardian *ad litem*.

SECOND. That the process of this Honorable Court may issue, according to law, to be served on the said guardian *ad litem,* requiring the said defendants, and each of them, to appear herein within the time by law provided, and answer the several allegations in this Bill of Complaint contained; answer under oath, however, being in that regard hereby expressly waived.

THIRD. That upon the final hearing herein, it may be decreed that the deed herein incorporated may be reformed by striking therefrom the words: "And also all and singular my real and personal property by me possessed *an* wheresoever sitnate."

FOURTH. That the said Rebecca Houghtailing may have such other and further relief in the premises as to this Honorable Court may seem meet and proper, and which equity may require. [7]

REBECCA HOUGHTAILING,
Plaintiff,
By FREDERICK E. STEERE,
Guardian.

Let process issue.
[Seal]

C. W. ASHFORD,
Judge of the First Circuit.

Territory of Hawaii,
City and County of Honolulu,—ss.

Frederick E. Steere, being first duly sworn according to law, deposes and says that he has read the above and foregoing bill of complaint, filed by him as guardian of Rebecca Houghtailing, and knows the contents thereof, and that the facts therein stated are true.

FREDERICK E. STEERE.

Subscribed and sworn to before me this 22d day of May, A. D. 1917.

[Seal] MILLIE F. RAWLINS,
Notary Public, First Judicial Circuit, Territory of Hawaii.

[Endorsements]: Circuit Court, First Circuit, Territory of Hawaii. At Chambers—In Equity. Rebecca Houghtailing, Through and by Frederick E. Steere, Her Guardian, vs. George De La Nux, Jr., and Daniel De La Nux. Bill for Reformation of Deed. Bill of Complaint. Filed at 8:30 o'clock A. M. May 24th, 1917. B. N. Kahalepuna, Clerk. A. D. Larnach, R. W. Breckons, Attorneys for Plaintiff.

Filed at 8:30 o'clock A. M. May 24, 1917. B. N. Kahalepuna, Clerk. [8]

Exhibit "A."

Know all men by these presents: That I, Rebecca Houghtailing (née Mrs. P. C. A. De La Nux) of Honolulu, Island of Oahu, Territory of Hawaii, for and in consideration of my Love and Affection for

my Grand Sons George De La Nux Jr. and Daniel De La Nux, and in further consideration of the sum of One Dollar ($1.00) to me in hand paid by my said Grand Sons George De La Nux and Daniel De La Nux, the receipt whereof is hereby acknowledged, do hereby bargain, grant, sell, Transfer and Convey unto my said Grand Sons George De La Nux and Daniel De La Nux, all and singular that certain piece or parcel of Land situate on Kamehameha IV Road, Kalihi, Honolulu, Island of Oahu, Territory of Hawaii, and being the same now occupied by me as my Home, together with the improvements thereon.

And also all and singular My Real and Personal property by me possessed and wheresoever situate.

To have and to Hold the same unto my said Grand Sons George De La Nux and Daniel De La Nux, their heirs and assigns, together with all and singular the rights, privileges, rents and income thereof, Tenements, Hereditaments and Appurtenances Forever, Reserving however unto me, the said Rebecca Houghtailing a Life Estate therein.

In Witness Whereof I the said Rebecca Houghtailing have hereunto set my hand and seal this 10th day of June, A. D. 1905.

REBECCA HOUGHTAILING.

In presence of:

WILLIAM SAVIDGE. [9]

Territory of Hawaii,
County of Oahu,—ss.

On this 8th day of November, A. D. 1905, personally appeared before me Rebecca Houghtailing (W).

known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein set forth.

WILLIAM SAVIDGE,

Notary Public, First Judicial Circuit, Territory of Hawaii.

Entered of record this 2d day of July, A. D. 1910, at 9:18 A. M., and compared.

[Seal] CHAS. H. MERRIAM,
Registrar of Conveyances.

[Endorsements]: Circuit Court, First Circuit, Territory of Hawaii. At Chambers—In Equity. Rebecca Houghtailing, Through and by Frederick E. Steere, her Guardian, vs. George De La Nux, Jr. and Daniel De La Nux. Bill for Reformation of Deed. Bill of Complaint. Filed at 8:30 o'clock A. M., May 24th, 1917. B. N. Kahalepuna, Clerk. A. D. Larnach, R. W. Breckons, Attorneys for Plaintiff. [10]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

BILL FOR REFORMATION OF DEED.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Plaintiff,

vs.

GEORGE DE LA NUX, Jr., and DANIEL DE LA NUX,
Defendants.

Order Appointing Guardian Ad Litem.

On presentation of the bill of complaint in the above-entitled cause, and it appearing to me therefrom that the defendants herein are infants, and that the appointment of a guardian *ad litem* is necessary; and it further appearing to me that the father of said infants, George F. De La Nux, is a proper person to represent said defendants in said suit:

IT IS NOW ORDERED, ADJUDGED AND DECREED, that George F. De La Nux be, and he is hereby, appointed guardian *at litem* of George De La Nux, Jr., and Daniel De La Nux, defendants in the above-entitled cause; and that service of process herein be made upon the said George F. De La Nux, guardian *ad litem,* in and also upon each of said minor defendants.

[Seal] C. W. ASHFORD,
First Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Amended by the Court Sept. 5/17.

J. C. CULLEN,
Clerk.

[Endorsements]: Circuit Court, First Circuit, Territory of Hawaii. Rebecca Houghtailing vs. George De La Nux, Jr., and Daniel De La Nux. Order. Filed at 8:30 o'clock A. M., May 24th, 1917. B. N. Kahalepuna, Clerk. A. D. Larnach, R. W. Breckons, Attorneys for Plaintiff. [11]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

BILL FOR REFORMATION OF DEED.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Plaintiff,

vs.

GEORGE DE LA NUX, Jr., and DANIEL DE LA NUX,
Defendants.

Answer.

Now come the defendants, George De La Nux, Jr., and Daniel De La Nux, by and through George F. De La Nux, their guardian *ad litem,* and in answer to plaintiff's bill of complaint, deny and allege as follows, to wit:

I.

That defendants have no knowledge or information

as to the truth of the allegations contained in paragraph I of plaintiff's complaint and, therefore, leave said plaintiff to such proof thereof and in that behalf as they may be advised on the trial hereof is material.

II.

That defendants have no knowledge or information as to the truth of the allegations contained in paragraph II of plaintiff's complaint, and, therefore, leave said plaintiff to such proof thereof and in that behalf as they may be advised on the trial hereof is material. [12]

III.

That defendants have no knowledge or information as to the truth of the allegations contained in paragraph III of plaintiff's complaint, and therefore leave said plaintiff to such proof thereof and in that behalf as they may be advised on the trial hereof is material.

IV.

Admit that the said Rebecca Houghtailing has been all of her lifetime a resident of the Territory of Hawaii, but deny that she is the owner of a considerable amount of property, both real and personal, or any property whatsoever situated and located within the Territory of Hawaii, and that included in said property thus owned by her is certain real estate known as her homestead, which is situated and located on Kamehameha IV Road in Kalihi, Honolulu, Island of Oahu, Territory of Hawaii; but allege that the said Rebecca Houghtailing did on the 10th day of June, 1905, transfer and deliver all of her said property, both personal and real, to the defendants

herein, subject to a life estate therein and that the said defendants are now the owners of all of the property of said Rebecca Houghtailing, subject to her life estate.

V.

Admit the allegations set forth in paragraph V of plaintiff's complaint.

VI.

Admit that the said Rebecca Houghtailing is an Hawaiian woman aged about fifty-six years; but deny that she is without any knowledge whatsoever about business and business *and business* affairs, or business or business affairs, but, on the contrary, allege that she is now and was at all times mentioned in plaintiff's complaint capable of transacting her [13] business and business affairs; deny that at times she is unable to properly care for and manage her property interests, or care for or manage her property interests, but, on the contrary, allege that she is now and has at all times herein mentioned been able to properly care for and manage her property interests; deny that for more than twenty years last past or for any time whatsoever she has been addicted to over-indulgence in alcoholic liquors, but, on the contrary, allege that she has never at any time, or at all, used alcoholic liquors to excess, and deny that the only time within the last twenty years when the habit mentioned has not been indulged in is when alcoholic liquors have not been obtainable by her, but, on the contrary, allege that although the said Rebecca Houghtailing has always been able to obtain alcoholic liquors if she so desired, that she, the said Rebecca Houghtailing, has never

at any time or at all over-indulged in the use of alcoholic liquors; deny that in consequence of her lack of knowledge of business and business affairs, or business or business affairs, and the habit of over-indulgence in alcoholic liquors, it became necessary to have the said Frederick E. Steere appointed as guardian of her person and estate, but, on the contrary, allege that the said defendants are informed and believe, and upon such information and belief, allege that the said Frederick E. Steere was appointed guardian of the person and estate of the said Rebecca Houghtailing in order that the said Rebecca Houghtailing might be relieved of the care of conducting her business affairs, and not because she was unable to care for and manage her property or was addicted to over-indulgence in alcoholic liquors.

VII.

Deny that some time prior to the 10th day of June, 1905, or at any or at all, one George F. De La Nux, who is the father of defendants, well knowing the lack of knowledge [14] of the said Rebecca Houghtailing of business and business affairs or business or business affairs, and full well knowing the habit of the said Rebecca Houghtailing of over-indulgence in alcoholic liquors, and full well knowing that owing to said lack of knowledge and said habit, or lack of knowledge or said habit, the said Rebecca Houghtailing would not be able to comprehend fully any action taken by her at a time when she had indulged in the use of intoxicating liquors to excess, or at any time or at all importuned the said Rebecca Houghtailing to place the title to the

homestead hereinabove referred to in the said defendants; that the said Rebecca Houghtailing being then and there, or then or there, desirous of pleasing the said George F. De Ia Nux and being likewise desirous of vesting in these two grandchildren the title to said homestead, reserving unto herself a life interest therein, did in the year 1905, or at any time or at all, except as hereinafter alleged, make known to the said George F. De La Nux her desire to so vest the title to the said property and that thereupon directions were given a scrivener to draft the deed necessary to carry out the said intention; but, on the contrary, allege that during the month of June, 1905, the said Rebecca Houghtailing, being free from the influence of the said George F. De La Nux and from the influence of intoxicating liquors, and being thoroughly competent to transact her business affairs, freely and voluntarily and of her own will and accord, expressed a desire to not only convey said homestead to the said defendants, but all of her property, both real and personal, subject, however, to her life estate.

VIII.

Deny that thereafter on the 10th day of June, 1905, at a time when the said Rebecca Houghtailing was under the influence of intoxicating liquors, or at any time or at all, there was presented to her for signature a deed of conveyance, [15] a copy of which is attached to plaintiff's complaint and incorporated therein and marked Exhibit "A," and that upon the presentation of the said deed, the said Rebecca Houghtailing in the presence of the father of said

defendants, the said George F. De La Nux, executed the same, except as hereinafter alleged, and that at the time of the execution of same, the said Rebecca Houghtailing relied upon the accuracy of the scrivener employed and upon the good faith of the said George F. De La Nux; but, on the contrary, allege that the said Rebecca Houghtailing was familiar with and knew the contents of said deed; and deny that at the time of the execution of said deed, or at any time or at all, the said Rebecca Houghtailing, by reason of her lack of knowledge of business and business affairs, or lack of knowledge of business or business affairs, and by reason of her over-indulgence in intoxicating liquors, with both of which the said George F. De La Nux was then and there, or then or there well acquainted, was unable to comprehend the terms and conditions, or terms or conditions, of the deed of conveyance which she then and there, or then or there, executed, but believing fully that the same constituted only a conveyance by her of the said homestead to her said grandchildren, reserving unto herself a life interest therein, and at the time of the execution thereof it was only the intention of the said Rebecca Houghtailing to make a conveyance of the said homestead to the said grandchildren, reserving unto herself a life interest therein; but, on the contrary, are informed and believe, and upon such information and belief allege, that at the time the said deed was executed by the said Rebecca Houghtailing to the defendants herein, the said Rebecca Houghtailing was not under the influence of intoxicating liquors and had not over-

indulged in the use of intoxicating liquors and was acquainted with the contents of said deed, and made the same freely and voluntarily and with the [16] express intention of not only conveying said homestead, but all her personal and real property, subject to a life estate, to the said defendants.

IX.

Deny that notwithstanding the intention of the said Rebecca Houghtailing, as set forth in plaintiff's complaint, to make unto the said defendants a conveyance only of the said homestead, reserving unto herself a life interest therein, the said deed so executed by her did, in truth and in fact, or in truth or in fact, contain a clause reciting that in addition to said homestead, the said Rebecca Houghtailing did further convey also all and singular her real and personal property by her possessed and wheresoever situated, thus transferring in terms unto the said defendants not only the said homestead hereinabove referred to, but all of the other property, both real and personal, owned and possessed, or owned or possessed, by the said Rebecca Houghtailing at the time of the execution of said deed except as hereinafter alleged, but, on the contrary, are informed and believe and upon such information and belief allege that the said Rebecca Houghtailing well knew at the time she executed said deed to the said defendants that it not only conveyed all of her said homestead, but all of her property, both real and personal, and executed the same freely and voluntarily.

X.

Deny that the insertion of the said provision in

said deed conveying property other than the said homestead was without the consent and knowledge, or without the consent or knowledge, of the said Rebecca Houghtailing, or against the will of the said Rebecca Houghtailing, or was at the instigation, suggestion and connivance, or instigation, or suggestion or connivance, of the said George F. De La Nux, and was inserted therein with the intent on the part of the said George F. De La Nux to deceive [17] and defraud, or deceive or defraud, the said Rebecca Houghtailing and with the intent on the part of the said George F. De La Nux to have said deed executed at a time when her condition, owing to the excessive use of intoxicating liquors, or any use of intoxicating liquors whatsoever, combined with her lack of knowledge of business and business affairs, or business or business affairs, would not permit her to appreciate the full force and effect, or full force or effect, of the instrument so to be executed by her, and that said instrument was executed at a time when the said Rebecca Houghtailing was under the influence of intoxicating liquors and that, in having the same executed at the said time, the said George F. De La Nux did intend to deceive and defraud, or deceive or defraud, the said Rebecca Houghtailing and did deceive and defraud her, or deceive or defraud her; but, on the contrary, are informed and believe and upon such information and belief allege that at the time said instrument was executed, the said Rebecca Houghtailing was free from the influence of intoxicating liquors and free from the influence of the said George F. De La Nux, and that

the said George F. De La Nux did not deceive and defraud, or intend to deceive and defraud, the said Rebecca Houghtailing by having the said Rebecca Houghtailing execute said deed, but that the said Rebecca Houghtailing was familiar with the contents of said instrument and that it conveyed all of her property, both real and personal, to the defendants and executed the same freely and voluntarily.

XI.

Deny that at the time of the execution of said instrument, or at any time or at all, the said George F. De La Nux knew that it did not express the intent of the said Rebecca Houghtailing; deny that the said George F. De La Nux knew that the said Rebecca Houghtailing did not intend to convey to the defendants property other than the homestead mentioned and, with [18] the knowledge above set forth, assured the said Rebecca Houghtailing that the said deed conveyed to the said defendants nothing save the said homestead; but, on the contrary, defendants are informed and believe and upon such information and belief allege that the said George F. De La Nux well knew at the time of the execution of the said deed the contents of the same and that it expressed the intent of the said Rebecca Houghtailing, and that the said George F. De La Nux did not at any time represent to the said Rebecca Houghtailing that the said deed only conveyed said homestead, but, on the contrary, the said George F. De La Nux advised the said Rebecca Houghtailing that the said deed not only conveyed the said homestead, but all

of her property, both real and personal, to the said defendants.

XII.

Deny that thereafter, and upon the discovery of the wrongful insertion in the said deed of the provision above referred to, and of the fraud and deceit, or fraud or deceit, which had been practiced upon her, the said Rebecca Houghtailing made demand upon the said George F. De La Nux that steps be taken to have said deed corrected and reformed, or corrected or reformed, in order that the same should carry out the intent of the said Rebecca Houghtailing, but that the said George F. De La Nux refused so to do, basing his refusal, amongst other grounds, on the fact that the defendants herein were minors, but, on the contrary, defendants are informed and believe and upon such information and belief allege that the said George F. De La Nux was never at any time requested by said Rebecca Houghtailing to have said deed corrected and reformed, but that the said Rebecca Houghtailing was satisfied with the conveyance of said property to the said defendants, and said defendants are informed and believe and upon such information and belief allege that [19] said Rebecca Houghtailing does not desire to prosecute this action nor does she desire to have said deed reformed and corrected or changed in any manner whatsoever.

XIII.

Admit the allegations contained in paragraph XIII of plaintiff's complaint.

XIV.

Admit that said Rebecca Houghtailing is unable to dispose of her property, as aforesaid, for the reason that the same has been conveyed to the defendants herein; but deny that she has any interest whatsoever in said property, other than a life estate.

XV.

Allege that it appears on the face of the complaint that by laches and lapse of time any right which complainant has, or may have had, to a decree of this Honorable Court that said conveyance be canceled and by the Court declared null and void, and of no force and effect, or to a decree for any other relief in said cause, became barred prior to the institution of this suit in equity as said conveyance was executed on the 10th day of June, 1905, and this action was not instituted until on or about the 22d day of May, 1917.

WHEREFORE, defendants pray that plaintiff's bill of complaint be dismissed, with their costs.

Dated Honolulu, T. H., September 20th, 1917.

GEORGE DE LA NUX, Jr., and
DANIEL DE LA NUX,
Defendants.
By GEO. F. DE LA NUX,
Their Guardian Ad Litem.
ANDREW & PITTMAN,
Attorneys for Defendants. [20]

Territory of Hawaii,
City and County of Honolulu,—ss.

George De La Nux, being first duly sworn, deposes and says that he is the duly appointed, qualified and

acting guardian *ad litem* of the above-named defendants, George De La Nux, Jr., and Daniel De La Nux; that he has read the foregoing answer and knows the contents thereof and that the matters and things therein set forth are true, except as to such matters as are stated on information and belief, and as to these he believes them to be true.

GEO. F. DE LA NUX.

Subscribed and sworn to before me this 20th day of September, A. D. 1917.

[Seal] MABEL A. DOANBURG,
Notary Public, First Judicial Circuit, Territory of Hawaii.

[Endorsements]: E. No. 2090, 2/339. Circuit Court, First Circuit, Territory of Hawaii. Rebecca Houghtailing, Through and by Frederick E. Steere, Her Guardian, Plaintiff, vs. George De La Nux, Jr., and Daniel De La Nux, Defendants. Answer. Filed Sept. 20th, 1917, at 10 minutes past 10 o'clock A. M. B. N. Kahalepuna, Clerk. Andrews & Pittman, 37 Merchant Street, Honolulu, T. H., Attorneys for Defendants. [21]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

BILL FOR REFORMATION OF DEED.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Plaintiff,

vs.

GEORGE DE LA NUX, Jr., and DANIEL DE LA NUX,
Defendants.

Replication.

Rebecca Houghtailing, through and by Frederick E. Steere, her guardian, the plaintiff in the above-entitled cause, saving and reserving to herself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendants, for replication thereto, saith:

That she doth and will aver, maintain and prove her said bill to be true, certain, and sufficient in the law to be answered unto by said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in the law, to be replied unto by this plaintiff; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied to and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed, or denied, is

true; all which matters and things this plaintiff is ready to aver, maintain, and prove as this Honorable Court shall direct.

And, by way of further replication to the new matter set up in the answer of said defendants, the plaintiff avers [22] and alleges as follows:

Plaintiff denies that she at the time of the execution of the deed, set forth and described in the plaintiff's bill of complaint, or at any time prior thereto, knew the contents of said deed, or was advised by George F. De La Nux, or anyone at all; that the said deed conveyed or purported to convey any property at all, other than the homestead of her the said plaintiff.

Plaintiff also denies that she is, or was at any time, satisfied with the purported conveyance of all her property to the said defendants; also denies that she does not desire to prosecute this action, but alleges that it is her desire to prosecute this action, and to have the said deed, before alluded to, reformed and corrected as prayed for.

Plaintiff further denies that it appears on the face of the complaint herein, or at all that plaintiff has been guilty of laches; also denies that the relief she has been and still is entitled to, is barred by laches or for any other cause.

WHEREFORE plaintiff prays that the relief prayed for in her bill of complaint herein be granted to her as prayed.

Dated at Honolulu, September 25th, 1917.

REBECCA HOUGHTAILING,
Plaintiff.
By FREDERICK E. STEERE,
Guardian.

ALEXANDER D. LARNACH and
R. W. BRECKONS,
Attorneys for Plaintiff. [23]

Territory of Hawaii,
City and County of Honolulu,—ss.

Frederick E. Steere, being first duly sworn according to law, deposes and says that he has read the above and foregoing replication filed by him as guardian of Rebecca Houghtailing, and knows the contents thereof, and that the facts therein stated are true to the best of the knowledge, information and belief of him, the said Frederick E. Steere.

FREDERICK E. STEERE.

Subscribed and sworn to before me this 25th day of September, A. D. 1917.

[Seal] MILLIE F. RAWLINS,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Received copy of the within Replication.
Dated Honolulu, T. H., September 26, 1917.

ANDREWS & PITTMAN,
Per P. B. PITTMAN,
Attorneys for Defendants.

[Endorsements]: E. 2090. 2/339. Circuit Court, First Circuit, Territory of Hawaii. Rebecca Houghtailing, Through and by Frederick E. Steere, Her Guardian, Plaintiff, vs. George De La Nux, Jr., and

Daniel De La Nux, Defendants. Bill for Reformation of Deed. Replication. Filed at 11:35 o'clock A. M. Sept. 26th, 1917. Sibyl Davis, Clerk. Alexander D. Larnach and R. W. Breckons, Attorneys for Plaintiff. [24]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

BILL FOR REFORMATION OF DEED.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Plaintiff,

vs.

GEORGE DE LA NUX, Jr., and DANIEL DE LA NUX,
Defendants.

Stipulation in re Answer.

George D. De La Nux and Lahapa De La Nux, now enjoined as defendants in the above-entitled action, having entered their appearance and waived service of the bill of complaint and summons upon them;

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the parties hereto that these defendants having so done, need file no answer in the above-entitled action, but that the answer heretofore filed by George F. De La Nux, as guardian *ad litem* of George F. De La Nux, Jr., and Daniel De La Nux, shall for all purposes be considered the answer of George F. De La Nux and Lahapa

De La Nux, and that no advantage shall be taken against either of said defendants by reason of their not filing separate answers in said cause or personally verifying the answer already filed.

Dated Honolulu, T. H., June 10th, A. D. 1918.

ROBERT W. BRECKONS,
By A. D. L. and A. D. LARNACH,
Attorney for Plaintiff.
ANDREWS & PITTMAN,
Attorneys for Defendants.

[Endorsements]: E. No. 2090, Reg. 2, pg. 339. Circuit Court, First Circuit, Territory of Hawaii. Rebecca Houghtailing, Through and by Frederick E. Steere, Her Guardian, Plaintiff, vs. George De La Nux, Jr., et al., Defendants. Stipulation. Filed June 14th, 1918, at 10 minutes past 10 o'clock A. M. Sibyl Davis, Clerk. Andrews & Pittman, 37 Merchant St., Honolulu, T. H., Attorneys for Defendants. [25]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

BILL FOR REFORMATION OF DEED.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Plaintiff,

vs.

GEORGE DE LA NUX, Jr., DANIEL DE LA NUX, GEORGE F. DE LA NUX, and LAHAPA DE LA NUX,
Defendants.

Decision.

On the 24th day of May, 1917, Rebecca Houghtailing, plaintiff, through and by Frederick E. Steere, her guardian, filed herein a bill of complaint against George De La Nux, Jr., and Daniel De La Nux, defendants, for the reformation of a deed executed by said plaintiff conveying to said defendants a certain piece or parcel of land situate on Kamehameha IV Road, Klihi, Honolulu, and also all real and personal property wheresoever situate with the reservation unto herself, the said plaintiff, of a life interest.

It appearing that the defendants were minors at the time the suit was instituted, their father, George F. De La Nux, was appointed their guardian *ad litem*.

On the first day of December, 1918, George De La Nux, Jr., one of the defendants, died, and this fact being called to the attention of the Court, an order

was made amending the bill of complaint by adding thereto as defendants the [26] names of George F. De La Nux and Lahapa De La Nux, father and mother, respectively, and the heirs, of the said George De La Nux, Jr., and they were thereby made party defendants to the suit.

It appears that on the 11th day of April, 1916, said Rebecca Houghtailing was declared a spendthrift within the meaning of the laws of the Territory of Hawaii owing to the excessive use of intoxicating liquors, and Frederick E. Steere was appointed the guardian of her person and estate. Thereafter, namely, on the 19th day of April, 1917, the said Frederick E. Steere was ordered and directed as such guardian to institute legal proceedings against the defendants for the reformation of the deed aforesaid.

The deed purports to have been signed by Rebecca Houghtailing on the 10th day of June, 1905, and acknowledged by her before a notary public on the 8th day of November, 1905. The instrument was recorded on the 2d day of July, 1910.

The deed, as already stated, purports to be a conveyance from plaintiff to the defendants of a certain piece or parcel of land situate on Kamehameha IV Road, Kalihi, Honolulu, which was then, and a long time prior thereto, and is still, occupied by the plaintiff as her home, and also all of her real and personal property wheresoever situate, subject, however, to a reservation of a life interest in the said plaintiff.

The plaintiff claims that she did not intend to convey all of her real and personal property in the man-

ner indicated, but intended to convey only the home at Kalihi. The object of this suit is to set aside and to strike from the deed the words: "And also all and singular my real and personal property by me possessed and wheresoever situate." [27]

According to the evidence adduced in the hearing of this case, Rebecca Houghtailing was about forty-nine years of age at the time the deed was executed in the year 1905. During the year 1905, and also during many years before and after that year, the plaintiff had living with her in her home her sons Henry and Charles and their families. At the time the deed was executed, two of plaintiff's grandchildren, the children of her son Henry, were living with her. One of them, Bathshèba, was brought up by her and was the favorite grandchild of plaintiff. Bathsheba lived with her grandmother from her birth up to the time of her death in the early part of this year.

The evidence discloses that George De La Nux, one of the present defendants and the father of the two minors, the original defendants, left plaintiff, his mother, when he was about seven years of age, to live with others. It was a number of years afterwards, namely, in 1899, that George's mother again saw him. He was then working at Honokaa, Hawaii, and about to be married. From the time he left his mother, when he was a mere child, to the present time, George has lived with his mother only on a few occasions. His two children visited their grandmother very rarely. George's mother visited him when he was working at Aiea at infrequent intervals.

The court is convinced from the evidence that Rebecca Houghtailing, the plaintiff, has been addicted to the use of intoxicati*on* liquors during the past thirty years and that such use has been so excessive as to impair her mentality. On account of her persistent intemperance she never acquired much knowledge concerning business affairs.

The management of her large estate was always left in the hands of others. Her main object in life, it seems was to [28] obtain as much money as possible out of the income collected by those in charge of her estate for purchasing intoxicating liquors.

Her demeanor, her general behavior, and her manner of speech as observed by the court during the trial seemed to indicate that her mind was not normal although at times she showed signs of having once possessed a keen intellect.

In view of the family history and the circumstances above outlined, the action of the plaintiff in conveying her entire property in the manner set forth does not seem to have been the action of a person in a rational and normal state of mind. The Court firmly believes that the plaintiff's mind became so impaired through the excessive use of intoxicating liquors that her son George, who appears to be a person of shrewd intellect, was able to influence her, without much difficulty, to execute the deed in the form above described.

The Court further believes that the plaintiff intended to convey only the home at Kalihi. Plaintiff reposed such implicit faith in her son George, probably on account of his exemplary habits as compared

with those of her other two sons, Henry and Charles, that she fully believed that the deed, which, according to her testimony, was prepared under his instructions, was limited solely to the conveyance of the Kalihi home.

It seems utterly unreasonable for plaintiff to have knowingly conveyed her entire estate to her grandchildren, the children of her son George, when it appears that George and his family were never in as close and intimate contact with her as the other two sons and their families. When the deed was executed these two grandchildren were not living with the plaintiff, the grandmother, and in fact they [29] very rarely visited her. In making the conveyance in the manner that she did, plaintiff wholly ignored her favorite grandchild Bathsheba, the one whom she brought up from infancy. Such action can only be attributed to an abnormal mind and a will easily influenced.

The explanations made by the defendant, George De La Nux, fail to satisfy the Court. His actions and the statements made by him at various times in connection with the execution of the deed and in connection with the attempt made by counsel for plaintiff, his mother, to straighten out the so-called tangle which arose out of the transaction appear to be not only inconsistent but also unreasonable.

The testimony of the witnesses called in his behalf is, in the opinion of the Court, not of sufficient weight to overcome the testimony submitted in behalf of the plaintiff. The circumstances as gathered from the

entire evidence in the case are all in favor of the plaintiff's claim.

In the light of the foregoing observations, the Court finds that Rebecca Houghtailing, the plaintiff, was at the time the deed in dispute was executed, a person addicted to the excessive use of intoxicating liquors; that because of her habitual intemperance she was unable to attend to business affairs, and for that reason was obliged to have others undertake the management of her large estate; that also because of such habitual intemperance she was easily influenced by her son, George; that she was deceived and defrauded by him by being made to believe that the deed conveyed only the Kalihi home; that she succumbed to such deception and fraud because of the trust and confidence that she placed in her said son.

WHEREFORE, it is the opinion of the Court that the deed dated the tenth day of June, 1905, executed by [30] Rebecca Houghtailing, the plaintiff, should be reformed by striking therefrom the words: "And also all and singular my real and personal property by me possessed and wheresoever situate."

A decree in accordance with the tenor hereof will be signed upon presentation.

Dated at Honolulu, T. H., this 30th day of June, 1919.

[Court Seal] WM. H. HEEN,
Third Judge.

[Endorsements]: E. No. 2090, Reg. 2, pg. 408. First Circuit Court, Territory of Hawaii. Rebecca Houghtailing etc. vs. George De La Nux Jr., et al. Decision. In Favor of Plaintiff. 33/57. Filed at

9:10 o'clock A. M. June 30th, 1919. Sibyl Davis, Clerk. Wm. H. Heen, Third Judge. [31]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

BILL FOR REFORMATION OF DEED.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Plaintiff,

vs.

GEORGE DE LA NUX, Jr., DANIEL DE LA NUX, GEORGE F. DE LA NUX, and LAHAPA DE LA NUX,
Defendants.

Decree.

This cause for reformation of the deed below set forth came on regularly to be heard before the Honorable Wm. H. Heen, Third Judge of the above-entitled court, on June 16, 17, 18, 19, 20 and 23, A. D. 1919, at the Judiciary Building in Honolulu, City and County of Honolulu, Territory of Hawaii, D. L. Withington and A. D. Larnach, appearing as counsel for the plaintiff, and Messrs. Andrews and Pittman, appearing as counsel for the defendants, and the Court having read the petition and the answers duly filed herein, and having heard the testimony adduced by and on behalf of the respective parties, from which it appears that all of the material allegations of the

said petition are true; that the defendants George De La Nux, Jr., and Daniel De La Nux were minors at the time the suit was instituted; that their father, George F. De La Nux, one of the defendants, was [32] appointed their guardian *ad litem;* that on the 1st day of December, 1918, the said George De La Nux, Jr., one of the defendants died; that this fact being called to the attention of the Court, an order was made amending the bill of complaint by adding thereto as defendants the names of the said George F. De La Nux and Lahapa De La Nux, father and mother respectively and the heirs of the said George De La Nux, Jr.; that the said George F. De La Nux and Lahapa De La Nux were thereby made party defendants to the suit; that on the 11th day of April, 1916, Rebecca Houghtailing, the plaintiff above named, was declared a spendthrift within the meaning of the laws of the Territory of Hawaii, owing to the excessive use of intoxicating liquors, and Frederick E. Steere was appointed guardian of her estate; that thereafter and on the 19th day of April, 1917, the said Frederick E. Steere was ordered and directed as such guardian to institute legal proceedings against defendants for the reformation of the deed before mentioned and hereinafter set forth; the deed in question purporting to convey to the said said George De La Nux, Jr., and Daniel De La Nux a certain piece or parcel of land situate on Kamehameha IV Road, Kalihi, Honolulu, and also all real and personal property wheresoever situate belonging to her, the said plaintiff, reserving unto herself, the said plaintiff, a life interest in said property.

This instrument purported to have been signed by Rebecca Houghtailing on the 10th day of June, 1905, and acknowledged by her before a notary public on the 8th day of November, 1905. The instrument was recorded on the 2d day of July, 1910, and a copy follows:

$2 Stamp. Know all men by these presents: That I, Rebecca Houghtailing (nee Mrs. P. C. A. De La Nux) of Honolulu, Island of Oahu, Territory of Hawaii, for and in consideration of my Love and Affection for my Grand Sons, George De La Nux Jr. and Daniel De La Nux, and in further consideration of the sum of One Dollar ($1.00) to me in hand paid by my said Grand Sons, [33] George De La Nux, and Daniel De La Nux, the receipt whereof is hereby acknowledged, do hereby bargain, grant, sell, Transfer and Convey unto my said Grand Sons George De La Nux and Daniel De La Nux, all and singular that certain piece or parcel of land situate on Kamehameha IV Road, Kalihi, Honolulu, Island of Oahu, Territory of Hawaii, and being the same now occupied by me as my Home, together with the improvements thereon.

And also all and singular My Real and Personal property by me possessed and wheresoever situate.

To have and to hold the same unto my said Grand Sons George De La Nux and Daniel De La Nux, their heirs and assigns, together with all and singular the rights, privileges, rents and income thereof, Tenements, Hereditaments and Appurtenances Forever, Reserving however unto me, the said Rebecca Houghtailing, a Life Estate therein.

In witness whereof I the said Rebecca Houghtail-

ing have hereunto set my hand and seal this 10th day of June A. D. 1905.

(Signed) REBECCA HOUGHTAILING.

In presence of:

(Signed) WILLIAM SAVIDGE.

Territory of Hawaii,
County of Oahu,—ss.

On this 8th day of November, A. D. 1905, personally appeared before me Rebecca Houghtailing (W) known to me to be the person described in and who executed the foregoing instrument who acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein set forth.

[Seal] (Signed) WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory of Hawaii. [34]

Endorsed thereon: Entered of record this 2d day of July A. D. 1910 at 9:18 o'clock A. M. and compared.

CHAS. H. MERRIAM,
Registrar of Conveyances.

The deed before mentioned as already stated, purports to be a conveyance from plaintiff to George De La Nux, Jr., and Daniel De La Nux, of a certain piece or parcel of land situate on Kamehameha IV Road, Kalihi, Honolulu, which was then and for a long time prior thereto and is still occupied by the plaintiff as her home, and also of all of her real and personal property wheresoever situate, subject, however, to a reservation of a life interest in the said plaintiff. According to the evidence adduced at the hearing of this case, Rebecca Houghtailing was

about forty-nine years of age at the time the deed was executed in the year 1905. During the year 1905, and also during many years before and after that year, the plaintiff had living with her, in her home, her sons Henry and Charles and their families. At the time the deed was executed, two of plaintiff's grandchildren, the children of her son Henry, were living with her. One of them, Bathsheba, was brought up by plaintiff and was the favorite grandchild of plaintiff. Bathsheba lived with her grandmother from the time of her birth up to the early part of this year.

George De La Nux, one of the present defendants, and the father of the two minors, the original defendants, left plaintiff, his mother, when he was about seven years of age and lived with others. It was a number of years afterwards, namely in 1899, that George's mother again saw him. He was then working at Honokaa, Hawaii, and about to be married. From the time, he left his mother, when he was a mere child, up to the present time, George has lived with his mother only on a few occasions. His two children visited their grandmother very rarely. George's mother visited him when he was working at Aiea [35] at infrequent intervals.

Rebecca Houghtailing, the plaintiff, has been addicted to the use of intoxicating liquors during the past thirty years and such use has been so excessive as to impair her mentality. On account of her persistent intemperance, she has never acquired much knowledge concerning business affairs. The management of her large estate was always left in the

hands of others. Her main object in life, it seems, was to obtain as much money as possible out of the income collected by those in charge of her estate, and such money use for the purchase of intoxicating liquors. The Court finds that the plaintiff's mind became so impaired through the excessive use of intoxicating liquors, that her son George, a person of shrewd intellect, was able to influence her without much difficulty to execute the deed in the form above described and set forth.

The Court further finds that the plaintiff intended when she signed the deed above described and set forth, to convey to the said George De La Nux, Jr., and Daniel De La Nux, only the homestead at Kalihi.

The Court further finds that in consequence of the trust and confidence reposed in her son George, she, the said Rebecca Houghtailing, relying on the statements to her made by the said George, fully believed that the deed before mentioned, which was prepared under the instructions of the said George De La Nux, was limited solely to the conveyance of the Kalihi home. That her son George deceived and defrauded her, the said Rebecca Houghtailing, by making her believe that the deed before mentioned conveyed only the Kalihi home; that this deception and fraud was made possible by reason of the trust and confidence placed by her, the said Rebecca Houghtailing, in the said George De La Nux.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that [36] the deed above set forth, dated the 10th day of June, 1905, executed by Rebecca Houghtailing, the plaintiff, be reformed

by striking therefrom the words: "And also all and singular my real and personal property by me possessed and wheresoever situate." Furthermore, that defendants pay the costs of this proceedings to be hereafter taxed.

Dated, Honolulu, T. H., June 30th, A. D. 1919.

[Court Seal] (Signed) WM. H. HEEN,
Third Judge, First Circuit Court, Territory of Hawaii.

Approved as to form only except as to clause decreeing costs to be paid by defendants, which are not awarded by the decision.

ANDREWS and PITTMAN,
By P. L. WEAVER.

[Endorsements]: E. No. 2090. Reg. 2, pg. 339. Circuit Court, First Circuit, Territory of Hawaii. At Chambers. In Equity. Rebecca Houghtailing, Through and by Frederick E. Steere, Her Guardian, Plaintiff, vs. George De La Nux, Jr., Daniel De La Nux, George F. De La Nux and Lahapa De La Nux, Defendants. Decree. 33/57. Filed at 2:40 o'clock P. M. June 30th, 1919. Sibyl Davis, Clerk. Alexander D. Larnach and Withington, Attorneys for Plaintiff. [37]

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482. Filed at 2 o'clock P. M., Sept. 15, 1919. B. N. Kahalepuna, Clerk.

No. 1220. Rec'd and filed in the Supreme Court Sept. 16, 1919, at 8:55 o'clock A. M. Robert Parker, Jr., Assistant Clerk. [38]

Filed at 2 o'clock P. M. Sept. 15, 1919. B. N. Kahalepuna, Clerk. [39]

MRS. REBECCA HOUGHTAILING

vs.

GEORGE DE LA NUX et al.

TRANSCRIPT.

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Filed at 2 o'clock P. M. Sept. 15, 1919. B. N. Kahalepuna, Clerk. [40]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

EQUITY—No. 2090.

PETITION FOR REFORMATION OF DEED.

REBECCA HOUGHTAILING, by F. E. STEERE, Her Guardian,

vs.

GEORGE DE LA NUX, Jr., and DANIEL DE LA NUX.

Before Honorable WM. H. HEEN, Judge Presiding in Equity.

APPEARANCES:

ALEX LARNACH and DAVID L. WITHINGTON, for Petitioner.

ANDREWS & PITTMAN, for Respondent.

HEARING:

Monday, June 16, 1919, 9 o'clock A. M.

Testimony of F. E. Steere, for Petitioner.

Direct examination of F. E. STEERE, called for petitioner, duly sworn, testified as follows:

By Mr. LARNACH—Your name, please.

A. Frederick Steere.

Q. Your business, Mr. Steere?

(Testimony of F. E. Steere.)

A. Real estate department of the Henry Waterhouse Trust Co.

Q. Here in Honolulu? A. Yes, in Honolulu.

Q. How long have you been a resident of Honolulu? A. Twenty years.

Q. How long have you been in business along the lines you have mentioned?

A. Sixteen or seventeen years.

Q. A part of your business consists in handling —property for [41] others, *doesn't, Mr.* Steere?

A. Yes.

Q. And you have followed that particular line for sixteen or seventeen years? A. Yes.

Q. Do you know Rebecca Houghtailing?

A. I do.

Q. Who sits here in court? A. Yes.

Q. Have you any business dealings with Rebecca Houghtailing, Mr. Steere?

A. I am her guardian at the present time.

Q. Appointed by whom?

A. Appointed by the Court.

Q. How long have you been such guardian, Mr. Steere? A. Since April 12, 1916.

Mr. LARNACH.—I will ask at this time that Probate 5053 be incorporated, that is to say, the petition asking for the appointment of Mr. Steere as guardian, and the order appointing Mr. Steere as guardian, for the purpose, to show his authority to act as guardian, for the purpose of showing the reason that Rebecca Houghtailing was placed under a guardian-

(Testimony of F. E. Steere.)

ship, in other words, to show she was incompetent at that time.

Mr. ANDREWS.—That wouldn't have anything to do with anything that happened in 1905; I haven't any objection to admitting that Mr. Steere was officially appointed guardian of her property; I don't want any *ex parte* matters in evidence that we cannot meet.

Mr. WITHINGTON.—That is a matter of argument; it is admissible in this case.

Mr. ANDREWS.—I want it distinctly understood that it is not [42] going in as evidence except to show *ex parte* that Mr. Steere is appearing here—

The COURT.—It is admitted for that purpose only, to show his authority to appear in this case.

Mr. LARNACH.—Do you know why it was necessary to institute those proceedings in 1916, Mr. Steere?

Mr. ANDREWS.—I object to it as irrelevant, incompetent and immaterial—

Mr. ANDREWS.—I want it understood—

Mr. LARNACH.— —placing Mrs. Houghtailing under guardianship?

Mr. ANDREWS.—It is understood that does not affect anything that happened in 1905.

The COURT.—Objection sustained. You can show acts which led up to this.

Mr. LARNACH.—How long have you known Mrs. Rebecca Houghtailing, your ward?

A. Why, I don't know that I can say just how many years. I know that I have known her, had to

(Testimony of F. E. Steere.)

do with her for a number of years, that is, all I know is this, some years ago, representing the Western Investment Company, through my connection with the Henry Waterhouse Trust Company, I passed on security, a mortgage that was presented in her behalf, and the mortgage was taken; since that time I have very often had to do with her to collect interest due on that mortgage. I cannot fix exactly that date, the date of that mortgage, can be fixed, and I can tell you how long I have known Rebecca Houghtailing.

Q. What do you know of Mrs. Houghtailing's business capacity?

Mr. ANDREWS.—What time? We object to that.

Mr. LARNACH.—During his period of his knowledge of Mrs. Houghtailing.

Mr. ANDREWS.—Unless it is shown to be antecedent to 1905; [43] one of our defenses is the allegation, the delay in bringing these proceedings.

Mr. LARNACH.—If your Honor please, it might be of interest to look at the alleged deed at this time in respect to Mr. Andrew's objection; the deed is dated the tenth day of June, 1905, and examination will show that it was brought before the notary public in November, having been dated in June, the same year, 1905, and it was not recorded until 1910, for some reason wasn't brought forward.

The COURT.—When was it acknowledged?

(Testimony of F. E. Steere.)

(November)

Mr. LARNACH.—On the 8th day of September, 1905, the deed is dated the tenth day of June, 1905; in other words, executed in June, apparently, and the notary's certificate is dated the 8th day of November, 1905, and wasn't entered of record until about five years later. Now we are going to show that until this was entered of record, at least Mrs. Houghtailing had absolutely no knowledge of the contents of this instrument; but she believed that it referred to the homestead, and that even then it wasn't brought home to her knowledge until sometime later when someone interested in those lands brought a copy of the deed to Mrs. Houghtailing, at which time she then sought legal advice.

Mr. ANDREWS.—That don't make any difference, if the Court please; the question is, if there was anything—they charge in June, 1905, she was incompetent, under the influence of liquor and unable to transact any business in 1905, now, all right, eliminate that, prove what her condition was in 1905 before this happened; you certainly cannot prove that she insane in 1908 or 1909.

The COURT.—Her condition after the execution of the deed, which was executed in June, 1905, would be only admissible for the [44] purpose of showing—

Mr. LARNACH.—Another reason will be this, if the Court please, that we intend to show, knowing that condition, later on George De La Nux securing the presence of this lady down at his homestead at Aiea, from that homestead took her right to her at-

(Testimony of F. E. Steere.)

torneys to call this suit off—

The COURT.—That may be true enough; you will have to commence something prior to June 1905.

Mr. LARNACH.—With the permission of your Honor, we are putting it on in an illogical order, by putting the guardian on and showing his reasons for bringing the suit to prevent his being called again, placing before the Court what he knows.

The COURT.—I will take it that you will be able to show the woman's condition prior to 1905?

Mr. LARNACH.—Yes, your Honor.

The COURT.—I will overrule the objection.

Mr. LARNACH.—(Last question read to witness.) Covering the period of your acquaintance with her?

WITNESS.—When I first, from my recollection, came in contact with Rebecca Houghtailing, first came in contact with her—not representing her, but representing people who were loaning money to her; after that it became my duty to see that the obligations of this mortgage, under this mortgage, were paid, and on every visit that I made out to her home, I always found her in more or less intoxicated condition, or what I considered to be a little intoxication; it has always been a very difficult matter for me to get the money due on this mortgage, and took repeated visits to her home to get it. That in a general way covers my experience all [45] during the time that I had to do with her up to the time of my being appointed guardian.

Q. Now, when you were appointed guardian were

(Testimony of F. E. Steere.)

you able or did you obtain from Mrs. Houghtailing a list of her property?

A. I did not.

Q. Why not?

A. She knew nothing about her property; she said that Mr. Mark Robinson had acted as her agent, that is all she knew about it.

Q. During the period of your knowledge of Mrs. Rebecca Houghtailing, can you state whether or not she was competent to manage her own affairs:

Mr. ANDREWS.—I object as calling for a conclusion; it is for the Court to say.

The COURT.—Objection sustained.

Mr. LARNACH.—Did Mrs. Rebecca Houghtailing ever conduct any business negotiations with you for any purpose whatsoever Mr. Steere, during, that is, covering the period of your knowledge of her—did she herself conduct any business negotiations with you? A. No.

Q. Now what property have you belonging to Mrs. Rebecca Houghtailing, in your charge at the present time or under your control?

A. Why, I have certain stocks and bonds, I cannot give it any more than that.

Q. Are they in your possession or in posession of anyone else, Mr. Steere?

A. Well, some, most of it, stocks and bonds are in my possession; there are some stocks in the possession of Mr. Robinson or the men representing the Mark Robinson estate [46] all of which is set out in my last report to the Court.

(Testimony of F. E. Steere.)

Q. That is, you mean the report that you filed with the court in the matter of the guardianship of Rebecca Houghtailing? A. Yes.

Q. Now, you say that you filed a report an account, with the Court, how long ago was that?

A. My recollection is that it was the latter part of 1916.

Q. Have you made any efforts, Mr. Steere to dispose of this homestead of Mrs. Houghtailing?

A. I have not.

Mr. ANDREWS.—That we object to as irrelevant, incompetent and immaterial. What is that for?

Mr. LARNACH.—Have you made any effort to—

The COURT.—Objection sustained.

Mr. LARNACH.—Have you made any efforts to realize on any of her property, meaning Rebecca Houghtailing's property?

Mr. ANDREWS.—We object, unless counsel explains what it is for.

Mr. LARNACH.—By virtue of this deed on record, Mr. Steere is unable to do anything with the property. If that is admitted that is all right.

Mr. ANDREWS.—Certainly.

The COURT.—It is a matter of law.

Objection sustained.

Mr. ANDREWS.—For the purpose of showing the value of this property we have no objection to it.

Mr. LARNACH.—Have you ever filed any inventory Mr. Steere, for Mrs. Houghtailing?

A. Well, my recollection is that in my report, if I am not mistaken, I called attention to the Court that

(Testimony of F. E. Steere.)

there was a suit pending in regard to the ownership of the property alleged to be—belong to my ward, and that until that was determined [47] I could not file any inventory that would be satisfactory to the Court that is, whether she had a life interest or a fee simple interest in certain schedule of property, stocks, bonds, but there has never been a real inventory of her property filed witih the Court.

Q. Never has?

A. Never has, that is my recollection of it.

Q. Could you obtain a list of the stocks that you have on hand, or can you refresh your recollection by being shown a copy of the account that you filed with the court, Mr. Steere?

A. Well, I couldn't swear, of course, that she was—I could swear to the exact number of shares, and so forth, I could identify the stocks as stocks on which I am receiving dividends, and so forth, I would want to say that I had so many shares.

Q. Can you make out a list and let us have it, Mr. Steere, that you have? A. Certainly.

Q. At your convenience.

Mr. ANDREWS.—I understand that this will be filed in evidence?

Mr. LARNACH.—Yes.

Mr. LARNACH.—(Reading from the account.) Now, we have, Mr. Steere, here, a dividend on thirty-seven shares of Oahu Sugar company stock, have you those thirty-seven shares in your possession belonging to Mrs. Houghtailing—

(Testimony of F. E. Steere.)

Mr. ANDREWS.—If the Court please, the papers should go in.

Mr. LARNACH.—Handing you this, Mr. Steere, which purports to be a copy of your Schedule "A," annual report filed by you, will you refresh your recollection, if you can, from that and let us know, what stocks Rebecca Houghtailing had, and what the value is? (Handing witness document.)

A. This schedule shows dividends received on certain stocks, [48] and I still have these stocks in my possession.

Q. And what are with Mr. Robinson, what stocks—what stocks are they, when you say, there are certain stocks? A. Thirty-seven shares of Oahu.

Q. Its value? A. I could not tell you its value.

Q. Next, please?

A. Ten shares of Waialua Agricultural Company.

The COURT.—Is that list correct, as far as you know, Mr Steere?

A. That list is correct as far as I know, except that this other, I could not tell you that.

Q. Have you just what shares are in this list there, or some one—

A. They are in the possession of Mr. Robinson, all the income from this is coming to me; there has never been any attempt on the part of Mr. Robinson to keep back that income; they have, however, refused to deliver to me certain shares of stock, also, since this has been made out, there has been some stock dividends on those, which of course,—all of which will show in my next report; I haven't put in

(Testimony of F. E. Steere.)

any report, I haven't intended to put in a report until this suit is finished; the income from every one of these stocks always comes to us, never any of the income kept back by the estate, but some of this list as put down here, shares of stock, are not absolutely in my possession, but I can't tell you just what they are offhand.

The COURT.—But they belong to Mrs. Houghtailing, nevertheless?

WITNESS.—They belong to Mrs. Houghtailing, they are in her name or in my name as guardian of Mrs. Houghtailing.

The COURT.—That is, stocks now held by the Robinson estate [49] are pledged by them as collateral?

WITNESS.—Robinson claims that Mrs. Houghtailing owes them something like ten thousand dollars; it was in that account.

The COURT.—With that exception this list can be admitted in evidence, there is no objection?

Mr. ANDREWS.—No objection, your Honor. Does that include the real estate too?

WITNESS.—This particular list here shows income from stocks and then you will notice also in the list dividends received by the Robinson estate, and this includes all her income at that time.

Mr. ANDREWS.—I haven't any objection to it.

The COURT.—That may be received in evidence, Schedules "A" and "B," if there is no objection to the copy, it will be admitted in evidence.

Received and marked Plaintiff's Exhibit "B"

(Testimony of F. E. Steere.)

(copy of the annual report of—annual account of Mr. Steere).

The COURT.—The document purporting to be the first annual account of the guardian of the personal estate of Rebecca Houghtailing is received in evidence and marked in order.

Mr. LARNACH.—Will you bring later, Mr. Steere, an exact list of all the stocks you have in your possession at the present time?

WITNESS.—Yes.

Mr. LARNACH.—With the permission of the Court we will file that showing exactly what Mr. Steere has in his possession now.

Mr. ANDREWS.—We object to that as immaterial.

WITNESS.—There has been some stock dividends since that was filed.

Mr. ANDREWS.—Also, I understand that some of this stock is not [50] in his hands, but belongs to Mrs. Houghtailing?

The COURT.—The value of the stock in the month of June, 1905.

Mr. LARNACH.—It would simplify matters very much if Mr. Andrews would admit that you cannot deed personal property by deed—

The COURT.—Proceed.

Mr. LARNACH.—Have you settled the claim of the Robinson estate, Mr. Steere?

A. I have not.

Mr. LARNACH.—That is all.

(Testimony of F. E. Steere.)

Cross-examination.

Mr. ANDREWS.—Mr. Steere, the question of real property, you say you don't know how much you have got, that is not reported in this report, any real property, that you say she has a life estate in?

Mr. WITHINGTON.—I want to show by Mr. Steere the date of this mortgage, also this list, later, but we are finishing outside of that.

Mr. ANDREWS.—These refer to these stocks?

A. No, she has dividends from an interest in the Robinson estate.

Q. Yes, but it doesn't show where the property is or its value?

A. No; I pointed—I distinctly pointed out to the Court I couldn't file an inventory until I could determine whether she had a life interest or a fee simple title to all of this property.

Q. But there is nothing in this report that shows any pieces of realty, to show that she has either a life interest or fee? [51]

Mr. LARNACH.—I object to that; the report is the best evidence; that is not complete. As a matter of fact, the report that Mr. Steere filed shows an audit by the Audit Company of Hawaii; there will be no objection to it if counsel changes his question.

The COURT.—There is nothing in here about real estate.

WITNESS.—I think you will find it shows dividends from an interest in the Robinson estate in this report; this was a complete report at that time from —of all receipts and disbursements.

(Testimony of F. E. Steere.)

Mr. ANDREWS.—But it is not an inventory, in other words, of the property, showing the real and personal property.

WITNESS.—Never been a complete inventory made, the kind that should be filed in this court of that property, and I pointed out to the Court when I filed this report, that I wanted further time to file the inventory. I do not think at the present time I could file a competent inventory until this suit is determined.

Mr. ANDREWS.—Then, now, in addition to that, is there any record anywhere showing here, when any of these stocks were purchased by Mrs. Houghtailing; this was simply stock she had on hand May first, 1916, was it not, when did you purchase any between the two—

A. No, I never purchased any stock for her; as I say, she has had some dividend shares come to her from stock dividends; I never—didn't consider that, with the deed against the estate, that I had a right to go and do anything to this other estate until it was determined.

Q. Do you know whether there are any stocks not mentioned in this report that you have in your possession or that Mr. Robinson has under his control? [52]

A. To the best of my knowledge, all stocks, and shares or dividends, or dividend paying stocks.

Q. Are mentioned in that inventory? A. Yes.

Mr. ANDREWS.—That is all.

Mr. WITHINGTON.—I offer the original first annual report, annual account by Mr. Steere.

(Testimony of F. E. Steere.)

The COURT.—Let the original then be marked Exhibit "B" and the copy withdrawn.

Redirect Examination.

Mr. LARNACH.—Q. Mr. Steere, showing you report of the guardian of the person and estate of Rebecca Houghtailing, Probate 5053, you filed that, didn't you, Mr. Steere, in the court here? A. I did.

Q. You made it up? A. Yes.

Q. And attached to the report and alluded to in your report are to be found exhibits "A" and "B," "C" and "D"; that is correct, is it? A. Yes.

Mr. LARNACH.—I offer it in evidence.

Received and marked Plaintiff's Exhibit "C."

The COURT.—This is a report of the guardian filed November 20, 1917, probate 5053.

Mr. LARNACH.—Also, if your Honor please, as Exhibit "D" the order signed by the Honorable C. W. Ashford, directing Mr. Steere to file suit in this particular matter before the Court, showing Steere's authority. [53]

The COURT.—This is an order dated April 19, 1917, Probate 5053, authorizing the guardian to bring suit, may be received in evidence and marked in order.

Received and marked Petitioner's Exhibit "D."

Mr. LARNACH.—As I understand, Mr. Steere, you are collecting on behalf of Mrs. Houghtailing—with the permission of the Court—matters which have arisen by reason of the introduction of these papers, showing Mr. Steere's—if I may be permitted to proceed—certain income from the estate of Mr. Robinson, you are obtaining certain income from

(Testimony of F. E. Steere.)

stocks and bonds which you have in your own hands now, isn't there some other source from which you collect income for Mrs. Houghtailing, some other property?

A. Yes, there is some property belonging to Mrs. Houghtailing—rent, paid by the Waialua Agricultural Company, that rent has just come to me up to the last six months, that rent had been anticipated, had never come into my hands until recently.

Q. I see; is the rent per annum that you collect from that?

A. Two hundred and fifty dollars per annum.

Q. Do you know the value of the land, Mr. Steere?

A. I do not.

Q. Do you know how many acres there are in that piece of land? A. I do not, offhand; no.

Q. But it is leased by Mrs. Houghtailing to the Waialua Agricultural Company? A. It is.

Q. Can you furnish us with that information, Mr. Steere, of the area of that piece of land at Waialua belonging to Mrs. Houghtailing for which you are collecting rent, and its value? A. Yes. [54]

Q. Now, how about any land on Kauai—hasn't Mrs. Houghtailing got any land on Kauai?

A. To the best of my knowledge she has; the income from that is coming through the Robinson estate at the present time.

Q. That is what is styled the Foster Hanalei land in your report? A. Yes.

Mr. LARNACH.—That is all.

Mr. ANDREWS.—No questions.

Testimony of J. L. P. Robinson, for Petitioner.

Direct examination of J. L. P. ROBINSON, called for petitioner, sworn, testified as follows:

Mr. LARNACH.—Your name, please?

A. J. L. P. Robinson.

Q. How long have you resided in Hawaii, Mr. Robinson? A. I was born here, in 1880.

Q. What age are you?

A. Thirty-nine years old.

Q. You were married and had your home here right along? A. Yes.

Q. What business are you in?

A. Well, I am—it is hard to say; you might call it agent and trustee.

Q. For whom? A. For the Robinson estate.

Q. You know this lady sitting here, Mrs. Houghtailing? A. Yes.

Q. Are you any connection of hers at all, Mr. Robinson? [55]

A. Yes, she is the daughter of my father's brother—half brother.

Q. How long have you known Mrs. Houghtailing?

A. Why, my first recollection of her was, about the year 1897, I think that is the first time I remember ever seeing her.

Q. How did you become acquainted with her at that time?

A. My father was on a sick-bed and she used to visit him.

Q. Where were you and your father living at that time?

(Testimony of J. L. P. Robinson.)

A. At his residence in Nuuanu Valley.

Q. Did your father have any business dealings with Mrs. Houghtailing? A. Yes, he did.

Q. What business dealings did he have?

A. He collected money for her and he acted as her agent.

Q. Acted as her agent— A. For many years.

Q. For how many years?

A. As I remember, the records go back to 1896.

Q. As far as the records show?

A. As far as the records show.

Q. How often did you see Mrs. Houghtailing, about that time, 1897? A. When I first saw her?

Q. Yes.

A. Oh, I can't say now; she used to visit father occasionally; my father was sick at that time; I had no occasion to see her at that time; I was going to school; I had no connection with the office.

Q. When did you first have any business connection with the office, meaning your father's office? [56]

A. 1901.

Q. Did you see Mrs. Houghtailing very frequently then, or infrequently?

A. Yes, very frequently; she came in pretty regularly.

Q. What do you mean, pretty regularly?

A. Well, I think about once a week.

Q. For what purpose? A. For money.

Q. To collect money? A. To collect money; yes.

(Testimony of J. L. P. Robinson.)

Q. Did you wait on Mrs. Houghtailing, or did your father, Mr. Mark Robinson?

A. At times I did when my father wasn't in the office.

Q. What have you to say regarding Mrs. Houghtailing's habits as to sobriety?

A. Well, she never was under the influence of liquor when she came into the office, although very often she appeared, she showed the effects of it; you see, she never appeared in the office under the direct influence of liquor, although she appeared that she had been drinking, very often.

Mr. ANDREWS.—Had been drinking some?

WITNESS.—Or the after effect of it.

Mr. LARNACH.—That was very often?

A. Yes.

Q. Right straight along?

A. Sometimes she didn't appear very straight, other times she was.

Q. How long did that course of conduct continue during the time she visited your office and was drawing money?

A. Until 1916, when Mr. Steere took charge of her affairs.

Q. Now, have you had—have you the same thing to say regarding [57] her conduct during that whole period from 1901 to 1916, Mr. Robinson?

A. Yes, I should say so, about the whole period, as far as I know.

Q. What do you know about Mrs. Houghtailing's business capacity or ability, did you ever hear of her,

(Testimony of J. L. P. Robinson.)

know of her to transact any of her own business?

A. Why, she apparently never had any business to do, she came to father, except some of her own private affairs that we had no connection with at all; we were connected more through the estate, through her income through the estate.

Q. From 1901 on to 1916, did you have any property or interests of Mrs. Rebecca Houghtailing in your charge, in your care, or control? A. I did.

Q. Now, what were those interests, Mr. Robinson?

A. How do you want them, amount of shares?

Q. Give us the list, if you can possibly do so, her interest, how many, so many shares of Ewa, so many shares of Waialua, quarter interest in realty, if she has an interest.

A. I have a list in my book here of her property, I haven't a list of the stocks and bonds—

Q. Real estate, if you please.

A. The two first columns representing her share, and the time of Mrs. Allen's death in 1914, when a small share was added on—in 1904, the first column, represents her share; the first two columns, that is, the whole interest, and her share; the second column would be 1914, at the time of Mrs. Allen's death.

Q. Her property was added to by reason of Mrs. Allen's death? A. A small interest. [58]

Mr. LARNACH.—Have you any objection to that being introduced in evidence, Mr. Andrews?

Mr. ANDREWS.—No.

Mr. LARNACH.—Just the first column of which,

(Testimony of J. L. P. Robinson.)

over which I will put a mark (A) in a circle, indicates what? A. Her share.

Q. Mrs. Rebecca Houghtailing's share?

A. Yes.

Q. In the lands which are placed on the opposite, to the right, or left? A. Yes, at the left.

Q. Now, the second column indicates what, if you please?

A. Represents the value of the property in 1904.

Q. That I will mark with a circle (B). What property do you mean, please, when you say, "her property"?

A. The property opposite each one of these lines, that is, each fraction.

Q. Of what particular estate?

A. Well, it is her interest in properties in her own name, that is, properties that are outside of the estate, and in the estate of James Robinson; it is rather complicated.

Q. In other words, it is the total of her property?

A. In other words, this list is divided this way, three properties, or four properties, come under the estate of James Robinson, then she has properties outside of the estate of James Robinson, 1, 2, 3, 4, 5, 6, properties; in other words, ten properties represented on this list, four properties of which belong to the estate of James Robinson, and four properties owned by members of the family.

Q. From those items referred to in the list, Mr. Robinson? [59]

A. Yes, the last four are the estate.

(Testimony of J. L. P. Robinson.)

Q. Then the first six mentioned on this list from Hoaeae land, Ewa, down to and including the property, the Nuuanu property?

A. Yes, are properties outside of the estate that she has an interest in or share.

Q. And the remaining four properties belong to the James Robinson estate, from the Robinson block down to and including the Waikiki property—

A. Belong to the estate of James Robinson.

Q. In which Mrs. Houghtailing has an interest?

A. Yes; it might set up an ambiguity in stating the James Robinson estate, and the Robinson estate, because we hold shares outside of the Robinson estate, and I represent, for instance, that Maunalua land that I pay rent to her, that doesn't come through the Robinson estate to her, but comes through me direct as agent of Foster, so that you want to separate, make a difference between the estate of James Robinson and the Robinson estate, which might be called the Mark Robinson estate.

Q. All a part of these items?

A. In other words, this—first six columns—the first six properties, are properties represented by my father, owned by my father and other members of the Robinson family outside of the James Robinson estate.

Q. Now, the third column represents what, the share?

A. The value of the share on that basis in 1904, tax basis. The first column represents the value of the

(Testimony of J. L. P. Robinson.)

whole property; the second column would her first—her share of that fraction.

Q. Now, coming to the fourth column, 1914, that indicates [60] the share of Mrs. Houghtailing in those same properties?

A. The same properties with the addition, that in these properties she comes into a share, became an heir of Mrs. Bathsheba Allen, which is added onto it.

Q. In the column labeled 1919, that indicates the taxable value of her property, all of her landed property which *her* carried in the last column?

A. Yes.

The COURT.—What is the value—

Mr. LARNACH.—Making the total value according to your calculation, of twenty-one thousand two hundred and twenty-eight dollars and sixty-three cents ($21,228.63)? A. Yes.

The COURT.—What is the total value of the property, real estate?

Mr. LARNACH.— —in Mr. Robinson's charge right now?

WITNESS.—That is the total value of the real estate in my charge right now.

Q. This is outside of the stocks and bonds?

A. Yes, this is the real estate.

The COURT.—That is all, what is the value of the property, that is what you want; the detail matters are not material as far as the Court is concerned.

Mr. LARNACH.—I will ask that this list be filed.

The COURT.—It may be received and marked.

Received and marked Petitioner's Exhibit "E."

(Testimony of J. L. P. Robinson.)

Mr. LARNACH.—How much increase from the list that you have made from the date, 1904, was there after Mrs. Allen's death, how much proportion was the increase in the land?

A. Well, the proportion will show in the list there; I think it increased from ten up to seventeen.

Mr. WITHINGTON.—Oh, the fraction, instead of 144, what was the [61] fraction after that?

A. Well, I have that on my other book. I haven't got it segregated that way.

Q. Instead of a 144th in these last three properties, where she shows a 144th interest, after Mrs. Allen's death, it changed to 13/576th.

The COURT.—All this property acquired before June, 1905?

Mr. WITHINGTON.—Yes, but not at Mrs. Allen's death, her share was increased, but came under will previous to that—her interest existed, but on Mrs. Allen's death she got her proportion.

The COURT.—The deed in controversy purports to convey what she possessed at the time, did she possess this interest at that time?

Mr. WITHINGTON.—But it was subject to Mrs. Allen, when she died it came to her, and to the other heirs.

Mr. ANDREWS.—We have no proof of that except the statement, and I am frank to say I know nothing about it; I presume what Mr. Withington says is true.

The COURT.—The increase was not very much.

WITNESS.—No, a very small fraction.

(Testimony of J. L. P. Robinson.)

The COURT.—Q. This taxation value was taken as of what year?

WITNESS.—I have taken—I have added the columns at each year, for instance, those are the values in 1904.

Q. What is the value in 1904, total value in 1904 of her share? A. $10,073.26.

Q. 1905?

A. I haven't got it by years. I went from 1904 to 1914, at the first change of the fraction.

Q. 1904 you say how much?

A. $10,073.26 In 1914 it increased on account of the raise [62] in taxes, in the different properties, to fourteen thousand six hundred and four dollars and ninety-three cents, and there is a still greater increase this year, 1919, increased taxation.

The COURT.—Are you familiar with the value of the stocks and bonds, the personal property owned by Mrs. Houghtailing?

A. Not in my mind. I would have to figure it out.

Q. Do you know the value of the stocks approximately?

A. No, I haven't figured it out at all—do you mean the market value or the present value?

Q. Approximately, have you any idea?

A. I couldn't say now. I haven't looked at the figures so long; I haven't figured it.

Mr. LARNACH.—I would suggest, Mr. Robinson, you bring into court a list of the stocks and other personal property that you have in your care, in 1904, showing any other changes up to 1919, please.

(Testimony of J. L. P. Robinson.)

The COURT.—In this list of properties is that Kalihi homestead included?

WITNESS.—No, this is only the Robinson properties in which she is interested; we had nothing to do with the Kalihi property.

Mr. WITHINGTON.—As I understand it, Mr. Andrews, James Robinson, Sr., left as his heir, James Robinson, Jr., and when he died he left a widow, the widow took one-half of one-ninth when Mrs. Allen—

WITNESS.—At the death of James Robinson, my grandfather, there was two children by a former wife, that is, James Robinson and his sister; there were really ten of them, but they came under the will; at special request she got an interest in the property; in other words, Mrs. Rebecca Houghtailing comes into this property through one of these children of the second [63] wife; she comes into the estate under her half brother or rather one of the half brothers' shares.

Mr. WITHINGTON.—That is her 144th, that is where it comes in (8x18).

Mr. LARNACH.—You have said before, that Mr. Mark Robinson, your father, was the agent of Mrs. Houghtailing; now, after his death—and had all these properties in his possession—after his death who followed him in that capacity?

A. I was appointed administrator of his estate.

Q. You acted as Mrs. Houghtailing's agent, didn't you? A. Yes.

Q. Now, at any time while you were in the office

(Testimony of J. L. P. Robinson.)

with your father or while you were acting as Mrs. Houghtailing's agent, did you hear anything of what purported to be a deed from Mrs. Houghtailing to Daniel De La Nux? A. No, I did not.

Q. And George De La Nux, Jr.? A. I did not.

Q. Did anybody at any time make any claim to your office, either to you or to your father, so far as you know, regarding any claim under this purported deed that has been alluded to? A. No.

Q. Were you ever informed by the gentleman sitting here, George De La Nux, that there was any such deed in existence?

A. What are you referring to, as to time?

Q. In which you, after you got in or before you got in as agent? A. Not before.

Q. When was it that you were given any information regarding this supposed deed? [64]

A. I am not quite certain; it was after I turned it over to—I think it was after I turned it over to Steere.

Q. After you turned your agency over to Steere?

A. That I first became acquainted that there was some question about this deed to the property.

Q. Who gave you that information, Mr. Robinson?

A. Oh, I don't recall exactly.

Q. Do you remember anything about it before turning your agency over to Mr. Steere?

A. Yes, I think I did.

Q. Did you know of that deed before?

A. He spoke of it then; I didn't know of it before then.

(Testimony of J. L. P. Robinson.)

Q. Was that the first time you were informed of it?

A. I think so.

Q. And when did you turn your agency over to Mr. Steere? A. 1916, I think.

Q. Therefore, prior to that date you had no knowledge of any deed made by Mrs. Houghtailing purporting to convey her interest to anyone else? A. No.

(Recess.)

Mr. LARNACH.—Mr. Robinson, how did the tax values, the value that you have set forth in that exhibit already filed, how did those values compare with actual values?

A. Well, that is rather hard—simply under, I should say. We wouldn't sell out our properties for those figures, of course.

Q. So that the actual value is more than the value—tax values that you have set forth? A. Yes.

Cross-examination.

Mr. ANDREWS.—Mr. Robinson, you have seen Mrs. Houghtailing [65] practically once a week, as I understand it, from 1901 until some time in 1916?

A. I will modify that statement a little, once a week and sometimes a little less frequently, but thereabouts.

Q. And at none of these times that she you speak about was she ever under the influence of liquor, as I understand it?

A. Not under the influence so that she could not navigate when she came into the office.

Q. At times, as I understood you to say, she showed

(Testimony of J. L. P. Robinson.)

the effects of drinking? A. Yes.

Q. That wasn't all the time, was it, Mr. Robinson?

A. No, there was some times she seemed to be rational, but mostly always.

Q. Now, was she rational at all times—did she understand what she was doing? A. Yes.

Q. And you say she consulted your father about practically all her business affairs, that is, as far as you knew, she always consulted your father about business affairs; is that correct?

A. Whenever she wanted any money she would come in and get it from my father, and as far as I know, there was no transactions exactly or any of her business, simply paying out her interest.

Q. Then all she had to do with either your father or yourself, she would come in to get money due or when possible get advances, whatever it was, simply money transactions?

A. Yes, I don't recall any actual transfer of property.

Q. So whatever business she did, if she did do any business at all, was done outside of your office, so far as your knowledge [66] is concerned; is that right? A. As far as my personal knowledge goes.

Q. And at all these times she knew what she was doing, but never had any very intricate conversations with her that would test her ability as to business matters, is that right? A. Yes.

Q. That sums up—my statement sums up practically your relations with her? A. Yes.

Q. Very simple; simply come in and ask for her

(Testimony of J. L. P. Robinson.)

money, and you would give it to her, and she would go out?

A. When she used to want more than her allowance we would have to argue with her, things of that kind.

Q. In all these matters, she knew what she was talking about, talked sensibly, didn't she?

A. Well, sensibly as anybody would after heavy drinking—something of that kind.

Q. Well, how many—can you give us how many times she appeared to be heavily drinking before coming?

A. I should say a number—pretty hard to say—when she would come into our office, in fact, you add from 1901 to 1916, fifteen years, I could not say how many times she was under the influence and how many times she was not.

Q. Well, she always made known what she wanted without any difficulty and understood what was going on, didn't she? A. Yes, she always appeared to.

Mr. ANDREWS.—That is all.

Mr. LARNACH.—That is all. [67]

Mr. LARNACH.—At this time we will call upon the respondent, Mr. George De La Nux, to produce the deed that has been alluded to many times, due notice has been given counsel.

Mr. ANDREWS.—Here is the deed, but I don't remember any notice being given.

(Here follows testimony given by Mrs. Rebecca Houghtailing.) [68]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

REBECCA HOUGHTAILING,

Plaintiff,

vs.

GEORGE DE LA NUX and DANIEL DE LA NUX,

Defendants.

TRANSCRIPT.

APPEARANCES:

A. E. LARNACH, Esq., and D. L. WITHINGTON, Esq., Attorneys for Plaintiff.

LORRIN ANDREWS, Esq., Attorney for Defendants.

Monday, June 16, 1919,——o'clock A. M.

Testimony of Mrs. Rebecca Houghtailing, for Petitioner.

Direct examination of Mrs. REBECCA HOUGHTAILING, called and sworn, testified as follows:

Mr. LARNACH.—Your full name, please.

A. Mrs. Rebecca Houghtailing.

Q. Your age, Mrs. Houghtailing? A. 63.

Q. Where do you live, please?

A. At the present time?

Q. At the present time?

A. Kalihi, Kamehameha Fourth Road.

Q. How long have you lived there?

A. Twenty-four years, about.

(Testimony of Rebecca Houghtailing.)

Q. How long have you lived in the Territory of Hawaii?

A. Well, I was born in the Territory of Hawaii, that is, sixty-three [69] years, I think.

Q. You have lived in this Territory ever since you were born? A. Yes, Mr. Larnach.

Q. Now, where did you receive your early education? A. In the Sisters' school.

Q. Catholic sisters or the— A. Catholic.

Q. How long did you remain with the Sisters?

A. Seven years.

Q. About what age were you when you left the Sisters? A. Seventeen.

Q. Now, did you receive any further educational training after that? A. No, sir.

Q. Were you trained in business at all, Mrs. Houghtailing, at the Sisters?

A. No, sir; little music, that is all.

Q. Did you study bookkeeping at that time?

A. No.

Q. Never have understood bookkeeping?

A. No, sir.

Q. Never studied bookkeeping? A. No.

Q. Do you know anything about accounts?

A. Yes, a little bit, not anything extra.

Q. Keeping accounts? A. Of my own.

Q. Your own little affairs— A. Yes.

Q. Now, when were you married, Mrs. Houghtailing, what year were you married?

A. I was married when I was seventeen; I don't remember the year now.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. To whom? A. To Mr. De La Nux.

Q. Where did you live? [70]

A. Kauai, Hanalei.

Q. How long did you live there?

A. I lived there, raised my three boys, lived there that long; I don't remember the years.

Q. Then did you come from there to Honolulu?

A. No; I made that son George, then I went to the coast and my husband, then I made the other two in Los Angeles, two of them boys over there (indicating in courtroom), Charles and Henry.

Q. Did you remain away from Hawaii very long?

A. I remained over there to make those two boys; then I came back; I think about seven years.

Q. Then you returned to Hawaii?

A. I returned and stayed until now.

Q. How many children did you have by Mr. De La Nux? A. Three.

Q. You said George, sitting over there by his counsel— A. Yes.

Q. Who else?

A. Henry, and one between Henry, but he died.

Q. Who else? A. Charley.

Q. Now, Henry is in court; stand up (Henry stands up)— A. Yes.

Q. That is Henry. A. Yes.

Q. How old is he?

A. Thirty-seven; I don't remember exactly.

Q. How old is George?

A. My idea, about forty-six.

Q. How old is Charles? He sits there (indi-

(Testimony of Mrs. Rebecca Houghtailing.)

cating). A. He knows best; I forget.

Q. About thirty-seven? A. Yes.

Q. Now, has George any children? A. Yes.

Q. How many? A. Two. [71]

Q. What are their ages?

A. One is dead, and one is living; about fifteen years, I think.

Q. Yes, and what is the name? A. Daniel.

Q. Is the wife of George living? A. Yes.

Q. And her name? A. Lahapa.

Q. Has Henry any children? A. Yes.

Q. How many, if you please? A. Three living.

Q. What are their names?

A. Eddie, Charley and Daisy—Eddie, Charlotte and Daisy.

Q. How old is Eddie? A. Fifteen.

Q. How old is Charlotte? (Charley?)

A. Charlotte a girl.

Q. How old? A. Fourteen.

Q. How old is Daisy? A. Twelve.

Q. Was there any child, a girl, that was living in 1905, and has since died. A. Yes; Bathsheba.

Q. When did she die?

A. February of this year.

Q. How old was Bathsheba when she died?

A. Fourteen—nineteen.

The COURT.—How old is Charlotte, again?

A. Fourteen.

Q. How about your son Charley—has he any children? A. Yes.

Q. How old are they?

(Testimony of Mrs. Rebecca Houghtailing.)

A. One is twelve, eleven or thirteen—no, eleven.

Q. What is the name of that child? A. James.

Q. The other?

A. I have forgotten now, Johnny—

Q. How old is Johnny? A. I saw—I forget.

[72]

Mr. LARNACH.—Now, with whom do you live at the present time? By yourself, or with any of your children? A. One son.

Q. Which son? A. Henry.

Q. How long has Henry lived with you in his house?

A. All the time excepting a few months off and on, when he is down in the country at Waialua, but generally he is with me.

Q. And with Henry, and is wife *wife* with you?

A. Yes, wife and children with me.

Q. All live at your house?

A. Yes, they had their children in my house, all of them.

Q. All of them—

A. These four, of course one of them is deas now that leaves three.

The COURT.—Who did you live with in 1905?

A. With my son Henry.

Q. That is in 1905?

A. Always just go for a little while for three or four months and then come back.

Q. Whereabouts? A. Maunalua.

Q. Whereabouts were you living?

A. Kamehameha Fourth road.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. Where was Charley living about 1904 or 1905?

A. Maunalua, come up with me too sometimes.

Q. Come up and stay at your house?

A. Yes, only lately, he had other business, had to go there to Castner, that is how he—they come to be away so long.

Q. How about your son George?

A. Never lived with me, only comes down from Hawaii, that is the time he is at Hawaii; now he is at Aeia; I mean since he [73] has been down there at Aiea, he has never slept at my house, that is, about ten years, good long while, I suppose; the reason is that he is angry, before when he lived in Hawaii he stayed with me until he goes home, that is how—

Q. Was that before 1905 or after? A. After 1905.

Q. That is your son George?

A. Yes, he was at Hawaii; then it is 1905 he was at Halawa, about that time.

Q. How about—where did you say your son George was in 1905? A. I think he was at Halawa.

The COURT.—Halawa, Hawaii?

A. No, over here, down at Aiea.

Q. In 1905?

A. Yes, 1905, that is, he has been there I don't know how many years, working for this plantation.

Q. When he comes to town does he stay with you?

A. No, he just stayed there to late hours and then goes home.

Mr. LARNACH.—Now, since 1905 has your son George visited your house?

A. Yes, comes and visits me, then goes home, as I

(Testimony of Mrs. Rebecca Houghtailing.)

say, off and on, his wife sometimes with him.

The COURT.—The children come to your place sometimes?

A. Yes, they come to see me, then go home, but lately never come to see me for years.

Mr. LARNACH.—How long since they have never come to see you at your house?

A. This time they haven't seen me, a long time, ever since the case was started, didn't care to come and see me.

Q. Do you remember signing any deed, Mrs. Houghtailing? A. Yes.

Q. In which the name of George De La Nux, Jr., and Daniel De La Nux were mentioned, meaning your two grandchildren, the sons [74] of George, your own son?

A. I remember signing a deed in that respect, I didn't care what was the reason of the deed, because I trusted this boy.

Q. Which boy? A. George.

Q. Meaning your son?

A. I was thinking this homestead was the only thing he wanted. I didn't think he had more in the deed, and the reason why I trusted this boy, and I really did, he had been working around this and that, and I trusted him, I trusted the boy, and I told him, "Well, you take your choice; this is the place you want; you can have it," and it was all right, and we went down and I think the whole thing—I didn't think the whole thing was going to be put into this deed,—why should I?

(Testimony of Mrs. Rebecca Houghtailing.)

Q. You say we went down, who do you mean?

A. Me and my son.

Q. Anybody else?

A. Not that I remember, but I remember seeing his wife down there, not with us, near—

Q. Where did you go?

A. Went down to Correa's Office.

Q. Lawyer Correa's office? A. Yes.

Q. Where was that? A. By the postoffice.

Q. Merchants street Honolulu. A. Yes.

Q. That old coral building? A. Yes.

Q. What was done there so far as you can remember?

A. Went to the place where he told me, of course I had a little drink in me, not ony that, this child that I had, this boy I trusted, he was my eldest boy and I trusted, and I would trust him again, I would trust him he wouldn't do anything else to me like that, to me, I would give him this homestead, I told him the place was under mortgage, the Kalihi place was under mortgage, and "You will have to look after this," and he said, [75] "Yes," and I don't think I took the troubles to read the whole thing.

Q. Now, is that your signature? (Showing witness a deed, recorded on the second day of July, in the Registrar's office in Liber 328, pages 476–7.)

A. Yes, that is my signature.

Q. Did anyone tell you what this deed contained?

A. No.

Q. How did you come to sign such a deed?

A. Well, I think the deed was that place up there.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. What made you think the deed was for that place up there?

A. Because I was told that we come down, that he could take that place; I told him that he could have that place.

Q. You told him that? A. Yes, I told him that.

Q. That it was the place you were coming down to sign the deed for?

A. I told him it was for that place alone.

Q. Who told you to come down? A. My son.

Q. Meaning who? A. George.

Q. This gentleman here (indicating)?

A. Yes. I didn't think that boy would act, treat me that way, and I didn't—

Q. Didn't you intend to sign a deed giving George and Daniel, your two grandchildren, all your real and—your real property and all your personal property? A. I did not.

Q. You did not? A. I did not.

Q. Would you have signed such a deed if you had known that the deed contained any such provision? [76]

A. I would not.

Q. Did you have any conversation with George about deeding this homestead to your two grandchildren? A. I did.

Q. More than once? A. Oh, more than once.

Q. Before the deed was signed A. Yes.

Q. Who suggested this office—Mr. De La Nux or yourself? A. My son.

Q. Meaning who?

The COURT.—Your son George?

(Testimony of Mrs. Rebecca Houghtailing.)

A. My son George.

Mr. LARNACH.—At the time this deed was signed, Mrs. Houghtailing, did you have any grandchildren, any of your grandchildren living in your house with you?

A. Yes, Mr. Larnach, I told you that I had four grandchildren in my house.

Q. Now, I want to find out whether any of those grandchildren living in your house at the time this deed was signed was George or Daniel?

A. These two do you mean, in the house? No.

The COURT.—Was George De La Nux, Jr., and Daniel De La Nux living at your house at that time?

A. No, your Honor.

Q. Whose children were they?

A. George and Daniel?

Q. No; whose children were living in your house at that time? A. My son Henry's children.

Q. Were there four or three at that time, 1905?

A. Four.

Q. Wasn't there one unborn at that time—Daisy wasn't born [77] at that time?

A. I forget; excuse me.

Q. At that time how many grandchildren were living there in 1905?

A. Three, because one is dead already now. No, two; one son and one boy; there was one child that died.

Q. Then one born after that? A. Yes.

Q. How about Bathsheba, the daughter of your son Henry? A. What about—

(Testimony of Mrs. Rebecca Houghtailing.)

Q. Was she living there with you?

A. Why, yes, I brought her up.

Q. Did you have any favorites?

A. That was the one—Bathsheba.

Q. She was living with you in the house at the time this deed was made?

A. Yes, I think she was in school; I forget.

Q. I mean the deed which Mrs. Houghtailing referred—has referred to and on which she has identified her signature, which I will introduce in evidence, as referred to by the witness in her testimony.

Received and marked Plaintiff's Exhibit "F."

The COURT.—You signed this deed in 1905, you remember that?

A. I don't remember the year, but I know I signed the deed.

Q. You had sugar stocks at that time?

A. I don't know what I had; only used to go and get money from Mr. Robinson; I know I had stocks; I don't know how much, this and that and where and what; I know I had stocks.

Q. After you signed this deed did you sell any sugar stocks? A. No.

Q. Never sold any at all?

A. No; I just used to come and see Mr. Robinson; I wanted some [78] money at all; of course, I wouldn't go there under the influence; I tried hard to go there without any, sometimes I had a big head, and to-morrow I would go there trembling, but I tried hard so that they didn't smell anything on me, for if they knew it they wouldn't give me any money; I

(Testimony of Mrs. Rebecca Houghtailing.)
tried to brace myself up to get some money.

The COURT.—Sober up?

A. Yes, that is the way I got it; that is the way I used to do with Mr. Robinson.

Mr. LARNACH.—For how many years *have been* indulging in the use of intoxicating liquor?

A. That I can't remember; about thirty years, I think.

Q. Did you indulge to excess or moderately?

A. Oh, my! to an excess, of course.

Q. How often—every day?

A. Well, every day if I could get it; if I had somebody to go and get it, had it every day; if I didn't have anybody to go and *get I* couldn't get it.

Q. How did you obtain liquor,—did you purchase it or was it presented to you?

A. Most of the time purchased.

Q. Did any of your sons present it to you?

A. My son George used to make a present, used to come over there and drink with me, my son George.

The COURT.—What do you mean by presents?

A. I mean by bringing it down for me for nothing.

Q. He used to bring liquor to your house?

A. Yes, bring it over to the house.

Q. What kind? A. Gin.

Mr. LARNACH.—Did your son George know of your weakness, know that you indulged to excess? [79]

A. Yes, he thought he was doing it in a good way, he did; my idea was that maybe as I liked gin it was his duty, of his, to bring gin; maybe that is what he

(Testimony of Mrs. Rebecca Houghtailing.)

thought, being his mother was a drunkard, all that.

Q. Now, after this deed introduced in evidence, as Exhibit "F," was made to George's children, did George continue coming to the house with his family?

A. No, after this meeting, no.

Q. He did not? A. No.

Q. For how long a period after this deed was made? I mean after the deed.

A. You mean after the deed, you say?

Q. Yes.

A. After this trouble, I mean, it is after the suit, he didn't come to see me again, but after the deed, sure, he used to come to me once in a great while, but this time now it is still worse.

Q. When he came to see you after the deed was drawn did he bring any presents at any time?

A. A little fish sometimes.

Q. How about anything to drink?

A. To drink, he would drink; yes.

Q. Now, after this deed was signed by you did you have any trouble with Mrs. Lahapa De La Nux?

A. Yes; it was years afterward that we had trouble; she came over to the house with my son George in the evening and brought some gin with them; she says to me after a little while we had a drink, she says to me, "I am here to see you about *sometime.*" I said, "What about?" "I heard you called my son a nigger." That is her son Daniel. I says, "No, I didn't call that grandchild of mine a nigger." "Oh, yes, I [80] heard it from some people, you called him a nigger." I said to her, "If you believe

(Testimony of Mrs. Rebecca Houghtailing.)

that, you believe it." I could not make her believe me, she believed what she heard, so we started arguing, throw stones at each other out in the yard, and then they went home.

Q. Now, did George or anyone else tell you whether or not this deed which you signed, meaning Exhibit "F," should be placed on record, Mrs. Houghtailing?

A. No, he didn't tell me, until I heard about it, but before this—thinking it was only the home at Kalihi I told him, I says, "Don't have this recorded," I says, "By and by the other boys will hear about this," giving it to him, so in order that the folks might not hear it; if they did they might be made with me, only after a while he thought he would go do it, anyway he went and done it without my knowing about it, without it coming out in the papers, but I didn't know anything about it until it came out in the papers and Mrs. Richards came and told me.

Q. Who told you? A. Mrs. Richards.

Q. What did she tell you?

A. She told me it was recorded.

Mr. ANDREWS.—I object to that as irrelevant, incompetent and immaterial and hearsay.

Mr. LARNACH.—Now, did you have any conversation with your son George after that—after he recorded the deed?

A. We had it; that was the same night that we had the row—came all at one time.

Q. Was anything said about the deed there about its being recorded?

A. Mrs. Richards—I was under the influence of

(Testimony of Mrs. Rebecca Houghtailing.)

liquor; I don't exactly remember what was said that night. [81]

Q. After that row that you have just described did George continue coming to your house?

A. Not after this row; never come.

Q. Do you remember when you and Mr. Breckons and I went down to see George at Aiea?

A. I do.

Q. From the time you had the row after you discovered the deed had been recorded until you and I and Mr. Breckons made that visit to George down at Aiea did George come to your house?

A. No, he didn't care to see me any more, I guess.

Q. Now, you have said the only time that you could not get any—the only time you were sober was at the time you could not get any liquor; that is true? A. Yes.

Q. And you always sobered up to go to Mr. Mark Robinson's office to get money; that is true, isn't it?

A. Yes.

Q. What did you spend most of your money that you obtained from Mr. Mark Robinson or Mrs. Houghtailing? A. Liquor.

Q. Now, when did you first find out that in addition to conveying your homestead, the deed that we have alluded to which you signed, purported to convey all your property you had on earth, Mrs. Houghtailing, when did you first find out?

A. From Mrs. Richards.

Q. What did you do, if anything, how did you find out? A. From Mrs. Richards.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. What did Mrs. Richards say?

Mr. ANDREWS.—Object to that, if the Court please; it is hearsay and not binding—

The COURT.—When was that that you heard from Mrs. Richards? [82]

A. That was before the case started that was in 1916—(speaking to Mr. Larnach:) When did this case start, Mr. Larnach? I think it is two years before that, that is how I found out.

Mr. LARNACH.—1917 the case was filed, as I remember. How did you find out?

A. I told you Mrs. Richards told me, two years ahead before the case, this thing, was started, about 1916 or 1917; it was two years before that, I knew.

Q. Well, was any paper shown you, Mrs. Richards show you any paper, any copy of a deed, anything like that?

A. No, she told me—oh, now, let me,—the time I found out the time my son was with me and Mrs. Richards. Now, have you got that marked down, the date that I told you when he came up with his wife and brought me some gin and asked why I called her son a nigger? I don't remember the year then, the same night I found out, that same evening.

Q. What did you find out?

A. About the place being recorded.

Q. The deed being recorded?

A. Yes, about the deed being recorded.

Q. But how soon after you found out it was recorded—withdraw that last question. When Mrs. Richards told you, as you say, she did about the

(Testimony of Mrs. Rebecca Houghtailing.)

deed, did she show you any papers?

Mr. ANDREWS.—She has answered that she didn't show any papers.

Q. Did you ever have any papers shown to you by anyone? A. Of the deed?

Q. Yes, purporting to be a copy of the deed?

A. No.

Q. Do you remember a man by the name of Joe Clark? A. I do.

Q. Do you remember if he made any copy of any instrument for you purporting to be a copy of a deed? [83] A. Yes.

Q. Wasn't it then that you found out?

A. I didn't care to look at it; I was drunk then when he came, just like nothing to me; I threw it aside on the trunk; I don't know where it is, so I don't know, so that anyway I didn't take no interest; it is from the time that my son and his wife was in that room; brought some gin and we had that row; that fellow he wasn't any good, what did he do, Mr. Larnach. It is this way, I won't talk, what is the use, after it has happened, recorded. Mr. Clark comes in with his papers, after my son had gone and recorded the deed, what was the use of these papers, huh? Well, isn't that the question you are asking me about?

Q. How long after recording of this deed were these papers shown you, a year or two years?

A. What Mr. Clark brought to me?

Q. Yes. A. That I don't remember.

Q. You didn't take any notice?

(Testimony of Mrs. Rebecca Houghtailing.)

A. No, because it had already been recorded, no use wasting time for that, especially when I am under the influence of liquor.

Q. Did you ever conduct any of your own business, buying and selling property? A. No.

Q. Have you sold any stocks?

A. Nothing of any kind.

Q. Have you transacted any business yourself?

A. No.

Q. Have you ever told George that this instrument, meaning the deed, Defendant's Exhibit "F" (plaintiff's), wasn't according to your wishes? [84] No, I did not.

Q. Did you ever tell anyone, George or anyone, in George's presence, that this deed conveyed more than you intended to?

A. Yes, conveyed more than I intended to.

Q. Did you ever tell that to George?

A. I did not; I didn't let him know anything.

Q. Why not?

A. Why, I don't know why; you just cannot explain; I just cannot explain myself.

Q. Is it that you didn't?

A. I didn't expect him to do so, that is—

Q. After you found out that this deed wasn't what you expected it was what did you do, did you seek legal advice? A. I did.

Q. And did he—to whom did you go?

A. I forget now the first I went to, Mr. Larnach, my son actually was the one that got you; I was on Kauai at the time that my son Charley, isn't it right,

(Testimony of Mrs. Rebecca Houghtailing.)

I was at Kauai at the time; you can ask him, I guess.

Q. Why did you go to a lawyer?

A. To find out.

The COURT.—Did you go to any lawyer yourself?

A. It is so long ago now,—let me see; I don't think so.

Mr. LARNACH.—Don't you remember coming to the office with Mr. Larnach, going over to the office of Mr. Brackons?

A. Yes; I was thinking that I had got one before you, you know; that is what I was trying to think.

Q. Don't you remember engaging me and Mr. Breckons?

A. Yes, now, of course; I thought I had already engaged one before you, you know; come to think of it, I did not.

The COURT.—How long before you went to see the lawyers was it [85] that you found it wasn't straight, wasn't right?

A. Oh, it was long before I went to the lawyer, only just as a drinking person will do, just sat down and did nothing; no, it was a long time, like when I had my row with me son up at the house, I don't remember the year; I knew it from that time, but I didn't see—seem to move, or do anything.

Q. Why didn't you get a lawyer at that time?

A. I don't know, it was gin, taking a rest, like that, neglected, neglected.

Q. You thought more of drinking?

A. Yes, just like that.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. How much income were you getting at that time?

A. Well, one hundred, seventy-five, sixty, if I come in good shape he give me plenty of money, he looks at me too, to see how I am; if I am drunk he give me little.

Q. That is every week? A. No, in a month.

Q. Sixty dollars a month?

A. When he could see my eyes all swollen only give me sixty dollars a month.

Q. Then when you were looking all right?

A. Looking *food,* two hundred dollars, two hundred and fifty dollars, like that, so I have to play smart with the old man.

Q. Where did you buy your liquor?

A. Lovejoy's, Peacock's, Brown; all the wholesale liquor stores, from old times until lately, until the prohibition law.

Q. What Brown?

A. Frank Brown on Richards Street, old Frank Brown, in the Campbell Block.

Q. You spent most of your money in buying liquor?

A. Yes, I wouldn't think about buying clothes; just liquor.

Q. When did you marry Houghtailing? [86]

A. I don't remember the year; I think it is about *sixt* or seventeen years ago.

Q. Before you signed this deed?

A. Oh, I was married before I signed that deed; living by myself I think; yes, I was living by myself.

(Testimony of Mrs. Rebecca Houghtailing.)

Mr. Houghtailing was dead years and years ago.

Q. He was dead?

A. He was dead, yes; it was only five years we were married, then he died.

Mr. LARNACH.—Now, after you employed me and employed Mr. Breckons, do you know if Mr. Breckons and I saw George and yourself, meaning Mr. George De La Nux here (indicating)?

A. Yes.

Q. Were you with us when we saw George?

A. Yes.

Q. Where did we see George? A. Aiea.

Q. What was the reason of our taking that trip to see George, Mrs. Houghtailing?

A. It—you wanted to find out from me? The work was under you, you were doing it, it was you, being a lawyer, you must—you was going to do this and that already, you had to do it. All I had to do was to sit down and listen to your questions and answers between you and my son; it is really true; it was that two lawyers were there to do the business and I sat down and listened.

Q. What business was done there, Mrs. Houghtailing? A. You ask, I remember all—

Q. Where did we start from, Mrs. Houghtailing, when you and I went down to Aiea?

A. From my house.

Q. From your house at Kalihi? [87]

A. Yes.

Q. Went down by automobile? A. Yes.

Q. Who met us when we arrived at George's

(Testimony of Mrs. Rebecca Houghtailing.)

house, do you remember? A. His wife.

Q. Was she friendly or otherwise?

A. She was friendly.

Q. How did she show her friendliness?

A. Well, she started to cry and so did I.

Q. Did she—was she hospitable? A. She was.

Q. How did she show her hospitality?

A. She saw my weakness and asked me if I wanted a little gin, and I said "yes," then she brought me some gin, and Mr. Breckons.

The COURT.—Did he have any?

A. He and my lawyer.

Mr. LARNACH.—Are you sure about Mr. Larnach?

A. Mr. Larnach didn't have any; he is too much of a missionary.

Q. Just before *we* left was there any more hospitality shown you, Mrs. Houghtailing?

A. It is all I could do; the bottle was there and I helped myself.

Q. You don't remember how many drinks were taken? A. No, I do not.

Q. Now, was there anything said about this deed down there by Mr. Breckons, myself and Mr. George De La Nux?

A. It was up to you and Mr. Breckons, so it is up to you to remember what questions were asked. I don't remember when I was under the influence of liquor.

Q. Who else was there, if anyone—you were intoxicated then a little bit? [88]

(Testimony of Mrs. Rebecca Houghtailing.)

A. A little bit; feeling good.

Q. Who else was there with us besides Mr. Breckons?

A. Mrs. Richards, I mean, and Mrs. De La Nux and Mrs. Charley De La Nux.

Q. Where is Mrs. Richards? A. She is dead.

Q. Mrs. Charley De La Nux?

A. Yes, over there (indicating her in the court-room).

Q. Mrs. Manuel Richards? A. Yes.

Q. Do you remember a saloon-keeper by the name of Cockett? A. I do.

Q. Do you know where he had his saloon?

A. Yes.

Q. Near your home? A. Yes.

Q. Did you ever purchase any liquor from him?

A. I did.

Q. About how much per month?

A. I can't remember per month; it is very hard to remember that when the bill is sent up; I might say, it is sometimes, it is two or three hundred dollars.

Q. Two or three hundred dollars? A. Yes.

Q. Was there anybody else in that vicinity that sold liquor, any storekeeper, anybody else?

A. Mr. Bodges.

Q. You purchased liquor from him?

A. Yes, on the sly, Sundays, like that.

The COURT.—Where is Bodges now?

A. He is dead.

(Testimony of Mrs. Rebecca Houghtailing.)

The COURT.—Here is Mr. Robinson now with the schedule.

(Mr. Robinson was here interrogated on the statement he prepared showing the value of the stocks and bonds, etc.)

Mr. LARNACH.—(Resuming.) Now, you stated you went to the office of Mr. Correa when you signed this deed, Mrs. Houghtailing; is [89] that correct? A. Yes.

Q. Where do you remember going from that office? A. Savidge.

Q. Was it on the same day? A. Yes.

Q. The COURT.—Did you read that deed before you signed it?

A. No, I didn't; I trusted *son* much on that son of mine.

Q. What did the son tell you at the time?

A. Expecting it was that for that place on Kamehameha IV road. *The* I told him that place was under mortgage; I said, "You have to pay the mortgage; it is under mortgage, on that place"; I was thinking of that place; it is all right, he was my son, and I only write my name down, because I trusted him so much.

Q. How about your son George, where was he when you were at Correa's office?

A. He was there.

Q. How about Mrs. Lahapa De La Nux, the wife of George? A. She was there.

Q. Did anyone ever give you the deed, place it in your custody?

(Testimony of Mrs. Rebecca Houghtailing.)

A. Mr. Correa just passed it to me, says, "You can—you know what is inside there," like that question, you know what all this is for, I said, "Yes"; I didn't take any time to look over it.

Q. Did anyone ever explain to you that it covered all the property that you had, both real and personal property? A. No, nothing; no.

The COURT.—The Court will take an adjournment until to-morrow morning at 9 o'clock.

Tuesday, June 17, 1919, 9 o'clock A. M.

Mrs. REBECCA HOUGHTAILING resumes the stand. [90]

Mr. LARNACH.—Who was there present when that deed was signed, Mrs. Houghtailing?

A. His wife was there.

Q. Meaning Mrs. Lahapa De La Nux?

A. Yes, Lahapa.

Q. Who else besides the wife?

A. That is all; myself, Correa, my son and his wife and I.

Q. *D* Four people present there? A. Yes, sir.

Q. And that was where?

A. In—that was in Mr. Correa's office near the postoffice.

Q. In Mr. Correa's office, I understand.

A. Yes.

Q. Where did you go if anywhere from there?

A. Mr. Savidge's office.

Q. Do you allude to Mr. Savide, the notary public?

A. Yes.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. What was done there, Mrs. Houghtailing?

A. They asked me if I knew what was inside, and I said, "Yes," thinking that—

Q. Who was present there? A. His wife.

Q. Meaning Mrs. George De La Nux, or Lahapa?

A. Yes.

Q. Was George there then?

A. I don't remember.

Q. Was there any explanation made to you in the office of Mr. Savidge?

A. Asked me if I knew all what was in the paper, and I said, "Yes"; Savidge didn't take any trouble to read it, told me to put my name down.

Q. You were not told, as I understand it, that it comprised all your property?

A. I didn't know it was all; I thought it was all at Kamehameha [91] IV road, and I trusted my son, boy of mine.

Q. Coming back to that visit at Aiea with Mr. Breckons and myself—withdraw that. Did you pay anything to Mr. Correa for drawing that instrument? A. No.

Q. Did you pay any money to Mr. Savidge for taking the acknowledgment? A. No.

Q. Coming back to Aiea, on the visit you made there with Mr. Breckons and myself, do you remember any of the conversation there that, anything being said about anyone being "jigging"?

A. Of course I remember myself, I was jigging myself, a little bit, I remember a little bit. What I remember is that we went out there on purpose to

(Testimony of Mrs. Rebecca Houghtailing.)

make up with my son George, being as I heard that he had written to you, for us all to come down there and make a settlement between the mother and the child, so after we had gone down there I heard him say, "Mama, I will leave it all to you, leave it all up to you."

Q. Who said that? A. My son George.

Q. Your son George, sitting over there?

A. Yes; and after I started to cry, and after the rest and my heart was sore at that time, so after we came home, then after that he changed.

Q. Who changed?

A. I came home with some idea that my son was going to do what was right afterwards; it is still the same thing, that change continues until now; we had to find out what is right and wrong, who is right and who is wrong; that is how the thing is.

Q. At the time the deed was signed, Mrs. Houghtailing, meaning the deed introduced in evidence, what property, what personal [92] property, such as furniture, jewelry and other things of that nature, did you have?

A. I don't still understand?

Q. At the time the deed was signed— A. Yes.

Q. —by you, what property, personal property did you have, if anything?

A. At the time?

Q. Yes?

A. Then mention the chairs and all that?

Q. Yes, furniture?

A. Furniture, yes.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. Jewelry? A. Yes, jewelry.

Q. About how much was that property worth, Mrs. Houghtailing?

A. The furniture is inside; I think it is worth over a thousand dollars; the pianola is worth over six hundred dollars; I think the rest is worth five hundred; call it twelve hundred dollars.

Q. That was furniture you had in your house, homestead? A. Yes, the—still the same.

Q. That includes jewelry? A. Yes.

Q. Now, you alluded yesterday to a copy of a purported deed that Joe Clark had given you at one time; do you know where that copy is?

A. You asked me—

Q. Yesterday you testified regarding a copy of an alleged deed that Joe Clark had given you?

A. Yes.

Q. Do you know where that copy is?

A. I got it around now; got it in my (bag). (Hands paper to Mr. Larnach.)

Mr. LARNACH.—This, I understand it, was the first time Mrs. [93] Houghtailing was informed of the truth—the true purport of that instrument that is on file.

Mr. ANDREWS.—There is no date on it.

The COURT.—Just for the purpose of showing that fact. It tends to corroborate her testimony, doesn't it?

Mr. LARNACH.—Yes, your Honor. We offer it in evidence.

The COURT.—It may be received and marked.

(Testimony of Mrs. Rebecca Houghtailing.)

Mr. ANDREWS.—We object to it as irrelevant, incompetent and immaterial.

Objection overruled.

Received and marked Plaintiff's Exhibit "H."

The COURT.—When did you get that copy of that deed?

A. After we had the row at the house, but I don't remember how many weeks or how many months after that; I remember we had a row up at my house.

Q. Was that 1910 or 1911? The original was recorded November 1910? A. It was after that.

Q. How long after that? A. 1911, I think.

Q. It was after July, 1910? A. Yes.

Q. How long after—short time afterwards?

A. Long afterwards.

Cross-examination of Mrs. REBECCA HOUGHTAILING.

Mr. ANDREWS.—Now, you say that Henry and Charles were living with you in 1905?

A. Yes, they were.

Q. What was Henry doing in the way of work? [94]

A. That I can't remember what he was doing, but he was working off and on, sometimes not working, and sometimes he was working.

Q. As a matter of fact, you were taking care of him, were you not, of him and his family, they were being supported by your money, taking care of the whole family; isn't that right?

A. Let me ask you this question, Mr. Andrews;

(Testimony of Mrs. Rebecca Houghtailing.)

isn't it a mother's choice if she wants to feed her children or not?

Q. Perfectly proper; we want to know the facts.

A. Of course when he was working, wasn't working, I was pleased to feed him. I am not going to let him starve.

Q. The same was true of Charles and his wife?

A. Off and on they were working, just the same, feed them when they were working.

Q. When they were not working you were *feed* all of them? A. Yes.

Q. What kind of work did Charles ever do at that time? A. Carpentering.

Q. What kind of work did Henry do?

A. Plumbing.

Q. Is Henry working now? A. Yes, he is.

Q. How long has Henry bee*ing* working?

A. Seven months.

Q. Before this time and since 1905 right up to now he has not had any steady work?

Q. Both Henry and Charles are drinking men, are they not?

A. No, Charles drinks onces a year or so; that is, News Year's and Christmas, like that, and that is all.

Q. And about Henry?

A. Henry drinks whenever he feels like it.

Q. That is, whenever there is liquor to drink?

A. He is like his mother.

Q. George isn't a drinking man? [95]

A. No.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. George has always worked steadily ever since he has been a boy?

A. He always worked steadily, and I trusted the boy on that account; he always did.

Q. He has always taken care of his own family?

A. Yes.

Q. And has never lived on you? A. No.

Q. You have never supported him as you have the other children?

A. No, but I am willing to support my children; I wouldn't let them starve.

Q. Now, then, *now then* you say you went to Correa's office, you knew Mr. Correa before that?

A. I did know him.

Q. He had done business for you before, hadn't he?

A. No, he didn't do any business for me; as a friend, I had some friends that was acquainted with the man, that is how I knew the man, in a friendly way, but no business way.

Q. Never handled anything for you? A. Never.

Q. Sure of that? A. Sure.

Q. Who suggested going down to Correa this time?

A. My son George.

Q. So George knew Correa?

A. I don't know if he did or not.

Q. He suggested going to Correa? A. Yes.

Q. You are sure of that? A. Yes, I am sure.

Q. You are sure you didn't go to Correa to consult with him after this paper had been drawn up finally,

(Testimony of Mrs. Rebecca Houghtailing.)

you and George went down there and they had it signed?

A. Yes. I went down with him and had the deed signed down at Correa's office. [96]

Q. That was the first time you had been in Correa's office about this matter?

A. I think so; I think that is.

Q. Now, on that day you were not intoxicated, were you?

A. A little liquor in me, I could not go without I wasn't intoxicated so that I was staggering, I could walk straight.

Q. Mrs. Houghtailing, do you remember after this suit was brought how you came down to my office with George and spoke to me about the matter?

A. Yes.

Q. And you were not intoxicated then, were you?

A. No.

Q. And you told me that this suit was being brought without your consent, that you wanted me to get the two lawyers to withdraw from the case, to have nothing to do with it, didn't want them to press it?

A. I remember your—I remember going down there, but there was a feeling in my head, being with my son in his house, he asked me this, but I was still inside,—I don't want to express myself, I mean, feeling.

Q. Didn't you tell me that, what I have just told you, that you wanted me to go down and stop the lawyers, didn't want them as your lawyers, and I told

(Testimony of Mrs. Rebecca Houghtailing.)

you I couldn't do that, and you suggested you wanted somebody to write a letter?

A. You *flks* yourself, you folks yourself did this to do that, I suggested to you to write the letter?

Q. Didn't you suggest to me to write a letter?

A. I,—you or my son did, or somebody in your—

Q. Mrs. Houghtailing, weren't you perfectly sober?

A. I was.

Q. You came down to my office and you told me that you showed me this paper, and you said this has been brought against my will. [97]

A. Which paper did I show you?

Q. The complaint in the case, which you were supposed—

A. I didn't have the paper there, I didn't have nothing.

Q. What did you say to me when you got down to the office?

A. It was my doing, I was there with my son; my son says, "He is my lawyer," and started to talk to me, you talked to me.

Q. What did I say?

A. You were trying to get me out of it, to have all on your side.

Q. What did you say and what did I say? Be fair.

A. Do you think I can remember anything, everything that you asked me.

Q. Didn't you tell me you didn't want the case go on, didn't want these lawyers, and I told you I couldn't do anything at all.

(Testimony of Mrs. Rebecca Houghtailing.)

A. If I had told you that you would have done that very quick.

Q. Do you mean to say that I wrote that letter?

A. No.

Mr. WITHINGTON.—She didn't say that.

A. Never.

Q. That is the letter that you wrote to your lawyers, isn't it?

A. I cannot say; I haven't got my glasses.

Q. Is that your handwriting? A. Yes.

Q. You wrote that letter yourself, then, to Mr. Breckons? A. Yes.

Q. Now, *did ' tell* you what to say?

A. No, you did not.

Q. You wrote that,—that is your own wording?

A. Yes, but this is Charley's letter; my son gave it to me.

Q. Your son gave it to you?

A. Yes, at his house. [98]

Q. Was that after you had seen, been in my office, or not?

A. After I had been in your office.

Mr. ANDREWS.—We would like to offer it in evidence.

Mr. WITHINGTON.—No objection.

Received and marked Defendant's Exhibit 1.

Mr. ANDREWS.—Now, then, after awhile you came back again to see me?

A. Yes, I went with my son George.

Q. You went there alone, didn't you?

A. I never went there alone.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. You told me, said, "I am in pilikia; they are making so much trouble for me; better tell them to change cancel the deed." Didn't you say that?

A. No, not alone; I went with him twice, I think.

Q. But both times you went with George you were very anxious that the case should be dropped, those two times you told me that, didn't you?

A. No.

Q. Don't you remember coming to my office alone afterwards and saying that you—words to this effect, I don't remember now, that you were in pilikia?

A. Never went there alone, Mr. Andrews.

Q. And that they were making so much trouble that I was to tell George to cancel the deed?

A. I didn't say that I told you; if I had told you that you would have done that very quick; you were working for him.

Q. Yes, that is, I was representing George. Now, all right. Now, you say the deed wasn't read to you?

A. No.

Q. The deed wasn't read to you and the reason why? A. Because I trusted my son. [99]

Q. Now, you say, testified, that there was some trouble between you and George's wife, Mrs. De La Nux, she accuses you of calling her child a nigger; when was that, what year?

A. I don't remember the year, but she came up to the house.

Q. How long after the signing of the deed was it, after the deed was recorded.

A. No, it was not recorded then.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. How long before it was recorded then?

A. Why, they came and explained the story, the fight in that evening, maybe two days after that thing was recorded, after two or three days, I don't remember; after that.

Q. I am talking about this row between you and Mrs. Lahapa De La Nux, you claim there was a row between you and Mrs. De La Nux? A. Yes.

Q. When did that happen,—was that before the deed was recorded or after? A. Before.

Q. How long before?

A. How long before we had the row?

Q. How long before it was recorded did you have the row? A. Call it two days, at the house.

Q. Two days before the deed was recorded?

A. We had a row, but after the row the thing was recorded.

The COURT.—A few days afterwards?

A. Yes (speaking in Hawaiian).

Mr. ANDREWS.—Did you tell your son George when the deed was signed not to have it recorded?

A. Yes.

Q. You were the one not to have the deed recorded?

A. Yes.

Q. What reason did you give? [100]

A. On account of my other two sons.

Q. They were living with you? A. Yes.

Q. And you were afraid they would find out about that? A. Yes.

Q. You didn't want them to find out about that?

A. No, because they would be mad with me; why

(Testimony of Mrs. Rebecca Houghtailing.)

should I give my son George first before them?

Q. Now, Mrs. Houghtailing, as a matter of fact, didn't you before this time offer to George a number of times to turn over your property to him, saying you were disgusted with the way the boys were treating you, that is, ill-treating you?

A. I used to tell him, not only him, but everybody, my neighbors as well.

Q. That the other two boys were treating you bad?

A. That is, we would get mad with each other; it is through drink.

Q. They wouldn't work,—that was a great trouble?

A. They couldn't get jobs, that is how.

Q. And it was through drink that you three would quarrel?

A. I would quarrel with Henry most of the time; it is through drink.

Q. You would quarrel with Henry most of the time, through drink on your part?

A. He used to drink with me, too.

Q. How about Charles?

A. Charles he never drank only New Year's and Christmas.

Q. And you quarreled with both?

A. I quarreled with both, because I am always in liquor, that is why.

Q. Those are the times that you say that you went to George and asked him if you couldn't give him all your property to him—[101] you did tell—did you ever George—ask George if he wouldn't take your

(Testimony of Mrs. Rebecca Houghtailing.)

property, you couldn't do it after your death, that you wanted to deed the property to him, to take it after your death? A. No.

Q. Never did? A. No, sir.

Q. Never said that to anybody?

A. No, sir, I never said that to anybody.

Q. You never—

WITNESS.—This child of mine asked me first to give him a piece of property, the piece of property up there.

Q. Now, then, Mrs. Houghtailing, how did you tell us that you came to get hold—come to go to Mr. Larnach's office, you say your son Charles hired him, how did you come to go to Mr. Larnach's office, did you tell us yesterday that your son Charles hired him while you—you thought your son Charles hired him while you were on Kauai?

A. It is this way: my son wrote me on Kauai, he thought there was a good lawyer for me, naming his name, Mr. Larnach, of course he couldn't do otherwise—couldn't do anything until I returned home, so when I returned home and they advised this letter—this lawyer, that he was pretty good, so we went to see Mr. Larnach.

Q. Did he tell you he had seen Mr. Larnach?

A. That I don't remember.

Q. Did you go with Charles to Mr. Larnach?

A. No, I went myself with Mrs. Richards and another lady.

Q. Now, you say you used to run a liquor bill at Cockett's saloon? A. Yes.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. That liquor wasn't drunk by you, was it? [102]

A. Why, anybody—how could I drink that only by myself?

Q. In other words, that was drunk by all the folks—

A. And friends, because I wouldn't have liquor if I didn't have friends to help drink it.

Q. Now, you say your furniture and jewelry was valued in 1905 at twelve hundred and fifty dollars; how do you know that?

A. I know it by my bills before, of course. Now, I didn't think it was coming in, going to come in court, so it is all destroyed, but the things are of that value, just as good as new, if people want to go and look at it.

Q. Now, you were not so intoxicated you didn't know how many things you bought, what the bills were?

A. How could I help seeing it every day I shouldn't forget—101—when I am passing around these things every day, intoxicated or not, around my furniture.

Q. Do—did you buy these things yourself, jewelry?

A. Well, of course, my uncle did, I was trying to get all the money from him to buy things with.

Q. Did you buy them yourself? A. Certainly.

Q. The furniture you bought yourself?

A. Certainly.

Q. Do you remember, you remember how much you paid for them? A. Yes.

Q. So that your memory hadn't disappeared?

(Testimony of Mrs. Rebecca Houghtailing.)

A. My memory can be good for half an hour, be half an hour good, I think.

Q. Now, do you know Mrs. Charles Edward Henry?

A. Do I know Mrs. Charles Edward Henry?

Q. You know her as Lizzie?

A. Yes, I know Lizzie. [103]

Q. She lived quite awhile at your house?

A. Yes.

Q. In Kalini? A. Yes.

Q. She lived at your house when you were living with George in Aiea and his family?

A. Before that, and the time that we went with George.

Q. Now, during the time that you were living with George were you intoxicated at Aiea all the time, then?

A. I wasn't feeling very good, very good; I was intoxicated once in awhile, maybe twice a week or so; I could not stand liquor then because I was sick.

A. As a matter of fact, isn't it true you went to luaus and never were intoxicated or touched liquor, also these friends at his house in Aiea, never touched liquor at all?

A. I never went to any luaus down at Aiea; I was living with him.

Q. Do you know a man by the name of Richards?

A. Who?

Q. Westerbee? A. I do.

Q. Do you remember going to luaus when he was present?

(Testimony of Mrs. Rebecca Houghtailing.)

A. No, I didn't go there; I was on a sick-bed; my son went there with his wife.

Q. How many times were you on a sick-bed while you were at Aiea? A. Once.

Q. Well, do you remember going to any entertainment that Mr. Westerbee was there present?

A. No.

Q. Now, coming back to Lizzie; do you remember, do you, you were very sick and you thought you were going to die, and told him you wanted to see George?

A. Yes, I did. [104]

Q. You told her that you wanted George to change that deed so as to give him the property instead of giving it to all the children?

A. No, it is the same thing over and over again; I didn't ask that.

Q. What is that?

A. I did not; I wanted to see Charley, Charley wasn't there, I wanted to see all my children, but it isn't to give to George, all to that one, and the rest go without.

Q. You didn't tell him you wanted to change the deed, talking to her, telling her, that you wanted him to agree, to cancel the deed giving it to his children instead of to him all your property?

A. I think all my—why should he have more,—because he is good looking; he wants better living and all that, and still he wants all of it himself?

Q. Did you ever tell Mrs. Henry, in Mrs. Henry's presence there, telling the other boy, when you were quarreling with them that they were going to get

(Testimony of Mrs. Rebecca Houghtailing.)

nothing, that everything belonged to George?

A. No.

Q. Do you remember quarreling when she was there, you and Henry quarreling, both drinking, he said to you, accused you of giving everything to George, that is, you had given it to him because he was a good boy and not a drunkard, like that, anything to that effect?

A. I have never said anything to him; when I was in liquor I would say anything; is that the way a person thinks, is that the way a person talks when jigged? A person that talks that way is crazy.

Q. That was at the time that you had given this property to George? [105] A. What is that?

Q. When you were having these rows with Henry?

A. I am saying, when I was jigged I had a row with them; I didn't fight with my children unless under the influence of liquor.

Q. That you had given all your property to George, you didn't know what you were doing?

Mr. WITHINGTON.—Objects—

Mr. ANDREWS.—Didn't you in the presence of Mrs. Henry when you had a quarrel with your son Henry, he being drunk, that he accused you of not caring for him, and that he accused you of giving all your property to George? And you said, "Yes, that is right," George was the only one who is working boy, and you had left it all to him?

A. Didn't I explain to you when I was under the influence of liquor I may have said that?

Q. Do you remember saying that?

(Testimony of Mrs. Rebecca Houghtailing.)

A. I don't; he would say anything to me when I was jigged, and he was jigged, didn't know, he didn't know what he says, or anybody else under the influence of liquor.

Q. As a matter of fact, you didn't ever see George shortly after that time he was born until he was seven years old?

A. I didn't see any of them. It was just the same.

Q. But Henry and Charles were born in California, were they not? A. Yes.

Q. But George was born here in Hawaii?

A. Yes.

Q. When he was a small baby you left him with a Frenchman and went to the Mainland— A. No.

Q. Where did you leave George or take him with you? [106]

A. Yes, I took him with me.

Q. Took him to California? A. Yes.

Q. Did you keep George with you all the time in California? A. Yes.

Q. So he lived with you up to the time he was seven years old?

A. Lived with me as long as I was in California.

Q. And you lived seven years in California?

A. Yes.

Q. And George was with you all this time?

A. Yes; if he doesn't know it isn't my fault.

Q. When you came back to Kauai George was still with you? A. Yes.

Q. So it is not true when you came back to Hawaii, of going to Hawaii where he was living and asked

(Testimony of Mrs. Rebecca Houghtailing.)

him if he was working there afterwards, didn't he, on the island of Hawaii?

A. Sure he had grown up to be a man over there; he was with his uncle over there.

Q. Your uncle, De La Nux?

A. Yes, De La Nux.

Q. That is, your father's uncle?

A. The father's brother.

Q. And you came to Hawaii and asked him to come back and live with you?

A. Nonsense; how could I ask him to come when he was working, for him to be idle?

Q. Do you know Mrs. Morris Kauhane-Lucy?

A. Yes, I do.

Q. She was living in Hawaii in 1889?

A. Yes.

Q. And near where George was living?

A. Yes. [107]

Q. Didn't you go up there at that time and urge George to come down and live with you in Honolulu?

A. No, I went up there to see them married; they were to get married; I wasn't going to get him to give up his job, when he had a good job from Pauhau, why should I have him give up his job. I went there all right.

Q. In 1901 and 1902, do you remember the time when Mrs. Lucy Kauhane was at your house you had a conversation with George and you told George that you intended to give him all your property—all your property, and he said, "Why not divide it between all us brothers," and you said his brothers hadn't

(Testimony of Mrs. Rebecca Houghtailing.)

treated you all right, and you wanted him to have it?

A. No; can I ask you a question, please, Mr. Andrews?

The COURT.—You answer the question.

A. I said, "No," Judge.

Q. Now, did you ever in the presence of Mrs. Lucy Kauhane ask George to come up when he was living at Aiea, to come up to town to get the deed signed so that you could arrange your property, you wanted to get it off your hand, off your mind?

A. No.

Q. Do you know George Richards? A. No.

Q. Do you know George Richardson, or George Richards?

A. I don't remember, anyway, maybe I do know him by sight.

Q. Do you remember in the present in any third person of your having a row with Henry in 1916 and you told this man that Henry was fighting you because you had given all your property to George because the other children hadn't treated you right; that Henry was robbing you?

A. No, I don't remember.

Q. Do you remember this man, this Mr. Richardson or Mr. Richards, while you were living at Aiea, and you invited him [108] down there to come and see you, you don't remember anything of that?

A. No, I don't.

Q. That you, while living at Aiea, at George's house, you told him that you had given—told Mr.

(Testimony of Mrs. Rebecca Houghtailing.)

Richardson or Richards, you had given all your property to George because the other children hadn't treated you right and wanted him to meet George and see what a fine son you had? A. I say, no.

Q. Do you know a man named Makanai?

A. Yes, I know him.

Q. He lives in Aiea? A. Yes.

Q. Now, while you were down in Aiea there he came to the house, George's house, didn't he?

A. Yes, always did come.

Q. Do you remember a conversation with him, talking to him, in which you said that George's brothers were against him, that they were very foolish and that you had been foolish, that you wanted George to have the property, that you were perfectly good, and happy and contented down there with George? A. No.

Q. And you were staying down with George in house, his house, for quite awhile in 1916?

A. I did; I was sick at that time.

Q. You knew at that time this deed had been signed, you had signed this deed in which you had given all your property, or conveyed all your property to George's two sons?

A. No, I had no knowledge that all my property was conveyed because I didn't see the paper when it was made.

Q. This was in 1916 you were down in George's house, wasn't [109] it,—what year was it that you were down at George's house?

A. I don't know; must be 1916.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. Way back in 1911 you knew all about this deed, Joe Clark showed you a copy of it?

A. That was all through George, that was all in the paper, of my giving it to George; of course this Clark found this out for me, but this Clark showed me after a fight we had in the house; you ought to remember what year that was.

Q. You said the fight was just two days before you recorded the deed, that was July, 1910? Now, then, that is the time that Clark showed you this paper?

A. Yes, after the row that we had—

Mr. WITHINGTON.—I don't think that is fair—

Mr. ANDREWS.—Now, then, that was way back in 1910 Joe Clark showed you this paper,—you read it all through?

A. 1910, 1911, I don't remember.

Q. So this was—so then you knew it after that, this paper had those words in it, after Joe Clark showed it to you? A. Yes.

Q. After Joe Clark showed it to you? A. Yes.

Q. Now, then, in 1916 or 1915 you went down, went and lived with George a long time? A. Yes.

Q. At that time you didn't say anything to him about this paper, did you?

A. No, I didn't care to say anything.

Q. You never asked him, "Here, George, what did you do this for? This is what we meant to do?"

A. No, I didn't care to ask him; it would be only useless; I was under his control; it is not for me to go and talk to [110] him.

Q. You were under his control?

(Testimony of Mrs. Rebecca Houghtailing.)

A. I was living with him,—what can a mother do with a child by themselves?

Q. He never made you come down there, did he?

A. No.

Q. You wanted to go down there at that time, you wanted to live with him? A. Yes.

Q. You were not under his control any more than he was under your control, and you were his mother?

A. I thought so; I didn't want to bother speaking anything about it.

Q. Now, *do* you remember going to—when you were living with George, and the—and a guest a second time down there, calling him in and telling him that you wanted him to be your attorney in fact and take charge of your affairs? A. He asked me.

Q. And you didn't ask him? A. No.

Q. You didn't tell him you were sorry that this case had been started and you wanted it to be stopped, you wanted him to act for you? A. No.

Q. Did you go to see Judge Whitney about it?

A. Yes.

Q. Was George with you then? A. Yes.

Q. You never went to see Judge Whitney alone and tell him you wanted George to be your attorney in fact? A. I went there with him.

Q. Never went there alone and asked him to try and act for [111] you after Mr. Steere had been appointed, and have Mr. Steere removed?

A. I went with him, my son, not alone.

Q. How many times did you see Judge Whitney?

A. Only once.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. Only once?

A. I think it is only once; to the best of my mem ory, it is only once.

Q. I want to be fair with you? A. That is fair.

Q. Now, you say you never went to Judge Whitney's to get him to have Mr. Steere give you an accounting to find out where it is—complaining of Mr. Steere, finally you told Judge Whitney that you wanted Mr. Steere removed and your son to act in his place?

A. Well, I say, I should say that—that I went to Judge Whitney—

Q. Yes. I mean going to him several times in this matter—alone?

A. I went there once with my son, my son says for me to go and see the Judge, which we did, and said, "We better get the Judge to remove Mr. Steere"; we couldn't get along, we couldn't get any money, at least I couldn't, if Mr. Steere was out and he put in I might get money, but it is that way, I went with him.

Q. Who suggested having Mr. Steere removed?

A. My son George.

Q. And you signed a power of attorney?

A. I had no idea; I was stupid.

Q. You were stupid?

A. I was feeling stupid every time. [112]

Q. Do you mean to say that when you went to Judge Whitney's you were under the influence of liquor?

A. Not under the influence of liquor; I went up

(Testimony of Mrs. Rebecca Houghtailing.)

to Judge Whitney's and sat down, just sat down and took things easy, didn't want to bother my brain.

Q. Who did the talking,—George or you?

A. We both spoke.

Q. Who did most of the talking, who told Judge Whitney what you wanted? A. I did.

Q. So at that time you did want your son made attorney in fact for you; is that right?

A. In that way, so I would get the money.

Q. This is what you signed, isn't it? (Handing witness a document.)

A. Yes.

Mr. ANDREWS.—We offer it in evidence.

Mr. WITHINGTON.—No objection.

The COURT.—It may be received.

Received and marked Defendant's Exhibit "Two."

Mr. ANDREWS.—Did you tell Judge Whitney that your son George had got you to sign a deed and which you didn't know anything about?

A. I didn't tell Judge Whitney. I told nobody until, of course, after that thing was found out at home, then that is the time.

Q. Found out by your two sons, you mean?

A. After the row that night and everything, that is how I found out everything; then everybody knew.

Q. Everybody knew how it—

A. From neighbors.

Q. Who told the neighbors? [113]

A. I did.

Q. So you did complain to your neighbors?

A. I did.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. But you never complained to George or his family?

A. I complained to the neighbors, why did my son do that—all.

Q. And you never said anything to George about it?

A. No, I never said anything to George; I thought he ought to know himself; he never owned up until now we get into court.

Q. So in spite of the fact that your son George had tricked you that way you were very much hurt to think that George would do anything like that?

A. I didn't expect a child like him—

Q. In spite of that, in spite of being very sore you still went to Judge Whitney, you still wanted George to—made your attorney in fact and control all your affairs; is that it?

Mr. WITHINGTON.—I don't think *tha* general statement is a fair statement of the witness' testimony.

Mr. ANDREWS.—Withdraw it. Despite the fact—in spite of the fact that you felt hurt and sore that George had tricked you, you were perfectly willing to have him made your attorney in fact, and control all your property?

A. What could a mother do, if he asked? I was just doing this for cowardness; it wasn't my real feeling.

Q. You have gotten all over your cowardness now, haven't you?

A. It is cowardness; might as well say so, say it.

(Testimony of Mrs. Rebecca Houghtailing.)

Q. You haven't any cowardness now,—you have gotten over that now, haven't you?

A. Well, I am supposed to feel the way a mother should feel towards her children. [114]

Q. Towards your other children now, Henry and Charles?

A. Towards all of them equally, why shouldn't I. I haven't any sore feeling towards him, maybe he has towards me because I am speaking the truth, he may have a grudge against me, but I haven't any against him.

Q. You were perfectly willing—withdraw that.

That is all.

Redirect Examination of Mrs. HOUGHTAILING.

Mr. LARNACH.—Mrs. Houghtailing, did you go to George's house to stay before this deed—before this visit that you and I and Mr. Breckons and yourself made to George's house, or was it after that visit that you went to stay with George?

A. After the visit.

Q. Prior to that visit how long was it that you had gone down to Aiea to see George, in other words, how long had you ceased being on visiting terms with George?

A. Well, after that I went down there and stayed two months, I think.

Q. But before that visit how long was it that you had been to see, to visit George or George see you?

A. Oh, it was years; he never come down to see me.

Q. At the time you had the row, the big row you

(Testimony of Mrs. Rebecca Houghtailing.)

have talked about, George was in your house?

A. Yes, the time of that row, the time we went to visit him with Mr. Breckons, that was a good many years between.

Q. Now, after Mr. Breckons and I had taken you down to Aiea you went down to stay with George, was that at your suggestion or George's suggestion? [115]

A. My own, I didn't feel well, I thought I would take a little vacation down to his house.

Q. It was while you were staying with George at Aiea after that visit of Mr. Breckons and myself and others, that you went to Judge Whitney's office?

A. Yes.

Q. Now you still had Mr. Breckons and Mr. Larnach as your attorneys? A. I did.

Q. Did you tell Judge Whitney that you had attorneys advising you in this matter?

A. I don't remember, Mr. Larnach.

Q. Mr. George De La Nux your son knew that didn't he, that you had attorneys?

A. I think I said that I had attorneys, I have forgotten, I forget to tell him, maybe I did state that, I don't remember.

Q. Mr. George was there present when Mr. Breckons and Mr. Larnach called on him with you, wasn't he? A. Yes.

Q. Now, did you tell Mr. Andrews when you made that visit to his house that you had attorneys, Mr. Breckons and Mr. Larnach?

(Testimony of Mrs. Rebecca Houghtailing.)

A. I think he know before I told him, I don't think I told him.

Q. After you told him that you still continued to visit Mr. Andrew's office did you?

A. I went there twice with my son, if any more than that I don't remember.

Q. Now, you stated that Mr. Andrews didn't tell you what to say what to write in your letter, did anyone tell you what to say, include that in your letter to Mr. Breckons? A. My son. [116]

Q. Who do you mean by that?

A. My son George.

Q. Told you what to say in your letter to Mr. Breckons?

A. He had it written out on a piece of paper at night-time ready.

Q. At that time didn't you have Mr. Larnach as your attorney? A. Yes.

Q. Then you wanted to discharge Mr. Breckons and keep Mr. Larnach?

A. That was the intention of the letter.

Q. Was it also George's intention that Mr. Breckons be discharged and Mr. Larnach still kept, that was the idea, was it?

A. I really couldn't make out what it is, it is all mixed up doings.

Q. Did you direct any letter of this nature to Mr. Larnach similar to the one that you wrote to Mr. Breckons, send me a similar letter on the same subject? A. I don't think so.

(Testimony of Mrs. Rebecca Houghtailing.)

The COURT.—You say your son wrote that on another piece of paper?

A. Yes, because he had no time.

Q. Was it written in English by him?

A. Yes, written in English.

Q. Just copied? A. Yes, in my handwriting.

Mr. LARNACH.—Who mailed that, you or your son, meaning the letter you wrote to Mr. Breckons?

A. I think it was me, not my son, I put it in the mail, he had no time to do it.

The COURT.—Why did you sign that power of attorney before Judge Whitney? [117]

A. He asked me to get him discharged—

Q. Who? A. George.

Q. Is that why you signed this power of attorney before Judge Whitney?

A. Not for Judge Whitney.

Q. This power of attorney, you appointed your son your agent? A. Yes.

Q. Didn't you sign that power of attorney before Judge Whitney? A Yes.

Q. How did you come to sign that?

A. He asked me to come there and sign it.

Q. Who did? A. My son.

Q. Why did you say yes?

A. That is a question I cannot answer.

Q. Did you want to sign?

A. I wanted to and I didn't want to, just act this way (indicating) really I can't tell you what was the meaning in that time, I can't express, honestly to God, which way it was.

(Testimony of Mrs. Rebecca Houghtailing.)

Mr. LARNACH.—Where were you living when you signed that power of attorney A. Kalihi.

Q. Were you still visiting George?

A. Well, I came from his house that day, I was still out there.

Q. That is what I mean, where were you staying on the day on which you signed that power of attorney?

A. With him.

Q. Meaning your son George? A. Yes. [118]

Q. At Kalihi or Aiea? A. At Aiea.

Q. Now, about how long before you came to the office of Mr. Larnach and engaged him as your attorney did Joe Clark bring to you a copy of that deed that we have introduced in evidence?

A. I cannot remember now, Mr. Larnach.

Q. Was it a year or two, can't you give us some idea?

A. Before a year I think, it wasn't a full year.

Q. You do not think it was a full year? A. No.

Q. That is your best recollection?

A. That is my best recollection.

Mr. LARNACH.—That is all.

The COURT.—Were you drinking at that time?

A. Still drinking.

Q. You have quit drinking have you not altogether now?

A. I quit when I don't get it, but you know there is some sly things around here, I can get something out of it, some selling on the sly, I can get some, when I get some I take it, blind pigs as you call it.

(Testimony of Mrs. Rebecca Houghtailing.)

Recross-examination.

Mr. ANDREWS.—On this question of this deed, when you got this Clark matter, did I understand that your best recollection is that it was a few days after the quarrel or a few days before the quarrel?

A. After.

Q. But it was a very short time after the quarrel?

A. Yes, sir.

Q. And the quarrel took place two days after it was recorded.

The COURT.—Two days before the quarrel—before recording.

WITNESS.—You know it too (to Mr. Andrews) you want to make me say something. [119]

Mr. ANDREWS.—No, I don't.

WITNESS.—Sure you do, Mr. Andrews.

Mr. ANDREWS.—That is all.

Mr. LARNACH.—That is all.

(Here follows testimony given by Mrs. Mollie Cockett.) [120]

Testimony of Mrs. Mollie Cockett, for Petitioner.

Direct examination of Mrs. MOLLIE COCKETT, called for petitioner, sworn, testified as follows:

Mr. LARNACH.—What is your name, please?

A. Mrs. Mollie Cockett.

Q. Where do you live? A. Kalihi.

Q. Right here in Honolulu? A. Yes.

Q. How long have you lived at Kalihi here in Honolulu?

A. I lived there about, very nearly twenty-one

(Testimony of Mrs. Mollie Cockett.)

years, I think, twenty-one or two years.

Q. Have you known Mrs. Houghtailing during that time? A. All that time.

Q. How far from the residence of Mrs. Houghtailing do you live?

A. Right now I live about, oh, I don't know, say, two blocks.

Q. Are you on visiting terms with Mrs. Houghtailing? A. Yes, always been.

Q. And have been all the time during that period of twenty or more wears that you have lived there?

A. Yes.

Q. Do you visit, or did you visit Mrs. Houghtailing often or infrequently? A. Quite frequently.

Q. What has been your practice covering a period of the last twenty years, have you been a frequent visitor at the house of *Mr.* Houghtailing, or infrequent? A. Frequent I might say.

Q. Does she ever visit your house?

A. Yes, she has.

Q. And has she visited your house during that period last [121] set forth, twenty or more years?

A. Yes.

Q. What have you to say regarding Mrs. Houghtailing's habits as to sobriety in particular?

A. I don't think I have ever known her to be entirely free from the influence of liquor.

Q. Covering a period of what time?

A. As long as I have known her.

Q. How does that affect Mrs. Houghtailing, the use of liquor, in the manner you have described, is

(Testimony of Mrs. Mollie Cockett.)

she boisterous, or please describe how it affects her?

A. Well, there is times when she is very quarrelsome, there are times when she is quite affectionate, there are times she is very easily led, there are times when she is very stubborn.

The COURT.—And times when she is down and out?

A. Yes, there are times when she is down and out, very often quarrelsome.

Mr. LARNACH.—Do you know where Mrs. Houghtailing used to get her liquor, during any of that period you have just described?

A. Before, my husband had a saloon, she used to get it from the corner store the Portuguese had.

Q. Do you know how often she would go down to the corner store for that purpose?

A. As often as she needed it, as soon as one bottle was empty or demijohn perhaps.

Q. How do you know that?

A. Because we were near neighbors and saw it.

Q. Were you living much nearer at that time?

A. Living very much nearer at that time, I was—

Q. Right next door?

A. No, but used to go right past our place. [122]

Q. Living above, how near?

A. Right around the corner, living where Mrs. French's is now. We had to come down to the corner there and catch the bus; there were no cars running, and very often she was—she or her son Henry was there, we would meet her at the store, or on the road or at home.

(Testimony of Mrs. Mollie Cockett.)

Q. Did you ever go to her place and spend some time? A. Yes.

Q. How long would you stay at different times?

A. They were friendly calls, I didn't visit her any long time, that is, to stay with her.

Q. Did you ever spend the afternoon?

A. Very often, far into the night at times.

Q. During your visits there have you ever seen Mrs. Houghtailing under the influence of liquor?

A. Yes.

Q. To any great extent? A. Yes.

Q. To what extent?

A. I have put her to bed often.

Q. Now do you know, when your husband was keeping a saloon in Kalihi, where Mrs. Houghtailing obtained liquor?

A. From the saloon, my husband's saloon.

Q. Your husband's saloon? A. Yes.

Q. How much liquor did she get, how much per week or per month, can you give us any idea?

A. Oh, dear, it was every day, gallons, and bottles of beer; there was only a beer and wine license.

Q. Do you know what she did with that?

A. Drink it, I suppose.

Q. Were you over there when she was drinking? [123]

A. During the time my husband had a saloon I didn't visit her so frequently, but I did have to take her home frequently, often, she used to come down to my store, I lived right next to the saloon.

Q. Take her home frequently? A. Yes.

(Testimony of Mrs. Mollie Cockett.)

Q. What condition was she in when you took her home? A. I would have to steer her.

Q. Was she in a condition so she undressed herself, got in bed herself?

A. Sometimes, most of the time I have had to put her to bed. I didn't undress her, she slept in her clothes, I never undressed her.

Q. Now, did any of her sons live with her, Mrs. Houghtailing, in the house, at the house in Kalihi when she was under the influence of liquor?

A. Henry and Charley were with her off and on most of the time, most of the time one or both boys were with her.

Q. Have you ever seen George De La Nux at the house at Kalihi?

A. Yes, that is where I think I first met him, then he came to the house with his mother.

Q. Do you know whether or not Mr. George De La Nux drinks?

A. Well, he didn't drink very much, he accompanied his mother, but didn't drink as much as the other two boys.

Q. Have you ever seen him drink with his mother?

A. Yes, at my house.

Q. At that time was Mrs. Houghtailing under the influence of liquor? A. She got some.

Q. How about George?

A. No, he didn't show any signs of it. [124]

Q. Do you know anything about the feelings of Mrs. Houghtailing towards her children,—the children of George, Henry and Charley?

(Testimony of Mrs. Mollie Cockett.)

A. Well, the day she came with her son George, she had been, or she had especially, she had been drinking the day before, and wanted something the next day, they both came—the day before they came to my place, the mother had been drinking, the son was with her on a visit, I think, and they came to the house, and she wanted some more liquor, some more drink, and he went down to the saloon, if I don't make a mistake, he bought a bottle of gin, and she told me that she liked to have George with her because he never objected to her drinking, while Charley and Henry they always objected, and there would always be a row when she drank even though the other boys drank too, when they would try to stop her, but George was very good, never stopped her, let her have it, never quarrel with her.

The COURT.—When was that?

A. It was during the time that beer and wine license—

Mr. LARNACH.—How many years ago?

A. I really can't remember.

Q. Prior to—

A. It was during the time the wine and beer license was in vogue, then it hadn't been very long then they allowed the license to have stronger liquors, then after that they shut them down.

(Recess.)

Mr. LARNACH.—Do you remember a grandchild of Mrs. Houghtailing's named Kulumanu?

A. Yes.

Q. Do you know where Kulumanu lived? [125]

(Testimony of Mrs. Mollie Cockett.)

A. She is always with her grandmother, Mrs. Houghtailing.

Q. Rebecca Houghtailing? A. Yes.

Q. Did Mrs. Houghtailing appear to be very fond of her? A. Very much so.

Q. A daughter of Mr. De La Nux—

The COURT.—Bathsheba?

WITNESS.—Yes.

Mr. LARNACH.—How long do you think Bathsheba lived with Mrs. Houghtailing—how many years?

A. She brought her up as—

Q. Is Bathsheba living or dead now?

A. She is dead.

Q. Died how long ago?

A. Not very long ago, I don't think it is a year.

Q. Do you remember how old she was when she died?

A. She died within a few days of her nineteenth or twentieth birthday.

Q. Now, what was Mrs. Houghtailing's appearance covering the period that you have testified concerning her, did she appear to be lively, appear to know what she was doing, please state what her appearance was?

A. She appeared to be in a dazed condition most of the time.

Q. Have you any idea of the amount of credit or cash purchases made during any month from your husband by Mrs. Houghtailing, purchase of liquor?

(Testimony of Mrs. Mollie Cockett.)

A. Yes, I think her bill used to run up as high as eighty dollars a month.

Q. Did Mrs. Houghtailing ever express in your hearing any particular regard for any particular family of her sons, or any individual in the family of her children? [126]

A. No, she always expressed to me that Henry was her favorite son, and Bathsheba her favorite grandchild.

The COURT.—Did you ever observe the children of George at her place?

A. They very rarely visited each other; I don't think that George was always on good terms with his mother, it was only that once or perhaps twice that he was at my place, that was when he was on a visit to his mother's.

Q. Did you see his children at that time?

A. No, he was alone.

Q. Did you ever see his children there with the family?

A. I think once I saw the children, I saw one or two boys there, and I inquired, and I was told they were George's children, I think they came from the Kamehameha school.

Q. Did you ever hear her talk about these two children of George's?

A. No, oh, she let me know that she had two grandchildren, that she had children, but not on very friendly terms.

Mr. LARNACH.—That is all.

(Testimony of Mrs. Mollie Cockett.)

Cross-examination.

Mr. ANDREWS.—How long did your husband have that saloon?

A. It was when the wine and beer license was first issued.

Q. Do you remember what year?

A. I can't remember the date.

Q. Do you remember how—remember first that they had a beer license, beer saloons?

A. Yes.

Q. Was that after that?

A. What is that?

Q. First they had their beer saloons, then a light wine and beer license? [127] A. Yes.

Q. Did your husband have only a beer saloon or had his saloon after the light wine and beer license *when* in? A. I am not certain of the year.

Q. It was 1903 or 4?

A. Somewhere around there.

Q. First they had these little beer saloons—

The COURT.—(Interrupting.) Have you any children?

A. Yes.

Q. Have you any about fifteen years old?

A. My youngest one is just about that.

Q. How old is he now?

A. My oldest boy will be seventeen in February.

Q. Now did your husband have a license at the time that boy was born? A. No.

Q. Before the boy was born?

(Testimony of Mrs. Mollie Cockett.)

A. No, the time the boy was born the license was not issued.

Q. After the boy was born the license was issued?

A. Yes.

Q. How old was the boy then when your husband got his first license?

A. I know my little girl, seventeen years old, was two years old when he got the license.

Q. She was two years old when your husband got his first license?

A. Yes, about two or three.

Mr. ANDREWS.—Mrs. Cockett, Henry and Charles always lived with their mother, didn't they?

A. Yes.

Q. During those days? [128]

A. Yes, off and on.

Q. Did they ever own their own home, that you know of, that is, the first time your husband had a license and you visited the house?

A. Well, I have always known of them as long as they were old enough to marry and have wives, they did have their homes.

Q. Where were their homes? A. At Maunalua.

Q. Both of them? A. Both of them.

Q. This was about 1903, 4 or 5, about the time that you say your husband got his license?

A. I don't know whether they were married or not, I expect it must be during that time.

Q. And Henry and Charles were both drinking then?

A. Well, Henry drank more than Charles.

(Testimony of Mrs. Mollie Cockett.)

Q. They both did drink as well as their mother?

A. Certainly, they drank about as much as their mother.

Q. Did you ever become—ever present when the three of them were intoxicated?

A. No, perhaps I was.

Q. Did you ever hear of any quarrels between them? A. Yes.

Q. Henry and Charles and their mother?

A. Yes.

Q. When they were all three intoxicated they would all fight? A. Yes.

Q. Now, you say that Mrs. Houghtailing brought up Bathsheba from a little baby? A. Yes.

Q. Ever since she was a small baby she lived with Mrs. Houghtailing? [129] A. Yes.

Q. And Mrs. Houghtailing was her mother, practically, is that correct? A. Yes.

Q. Well, then, Mrs. Houghtailing was in good enough condition to look after this baby, look after her as a small child, wasn't she, knew what she was about?

A. She didn't have the actual care of the children, of the child, that is, as far as washing the clothes, things of that sort.

Q. What do you mean, that she brought her up?

A. She raised her in the family, she is the one that actually supported the child.

Q. During all this time that Bathsheba was a small baby did the mother of Bathsheba live at Kalihi with Mr. Houghtailing?

(Testimony of Mrs. Mollie Cockett.)

A. Off and on.

Q. Well, then, when you say she brought her up, it was only off and on that Bathsheba was at the house?

A. Certainly not, is that what you understand me to say when I say she brought her up?

Q. That is what I want to know, you said now her mother and father were only off and on living at Kalihi? A. Yes.

Q. Then the child was only living there off and on? A. No, Mrs. Houghtailing had her always.

Q. That is, regardless of where her father or mother lived, the child was there with Mrs. Houghtailing all the time? A. Yes.

Q. She was capable of taking care of her?

A. She had servants. [130]

Q. Well, she was capable—was she capable of taking care of herself?

A. I say she was capable of—she brought her up to womanhood.

Q. And she never was in such condition that you refused to sell her liquor? A. I?

Q. Your husband?

A. Why, certainly, he was in the business to sell it.

Q. Whenever she came and bought liquor she was furnished it? A. Yes.

Q. Good enough condition then to be able to purchase liquor, that is correct, is it? A. Yes.

Mr. ANDREWS.—That is all.

(Testimony of A. G. Correa.)

Mr. LARNACH.—That is all.

(Here follows testimony given by A. G. Correa.) [131]

Testimony of A. G. Correa, for Defendant.

Direct examination of A. G. CORREA, called for defendant, being sworn, testified as follows:

Mr. ANDREWS.—Mr. Correa, what is your profession?

A. Attorney at law.

Q. When were you admitted to practice law?

A. February, 1896.

Q. In the Territory of Hawaii?

A. In all the courts of the Territory of Hawaii.

Q. Since that time you have practiced your profession continuously? A. I have.

Q. Do you hold any position at the present time?

A. Deputy county attorney of the county of Hawaii.

Q. During the year 1905 where were you practicing law? A. City of Honolulu.

Q. And prior to that time did you know Mrs. Rebecca Houghtailing? A. I did.

Q. How well do you know her?

A. A considerable time prior to 1905 I knew Mrs. Houghtailing well; I became acquainted with her through her husband, Mr. Houghtailing, who was a client of mine, of Charles Creighton and myself, of the firm of Creighton and Correa, and subsequent to the death of Mr. Houghtailing I continued to act for

(Testimony of A. G. Correa.)

Mrs. Houghtailing in various and numerous matters.

Q. And this continued right up, up to the year 1905?

A. Yes, sir, as near as I can state from memory.

Q. So that she had consulted you on a number of matters prior to the year 1905, July, 1905? [132]

A. Yes.

Q. On legal matters? A. Yes.

Q. I hand you exhibit "F," defendant's (plaintiff's) exhibit "F"—and ask you if you recognize that.

(Hands witness plaintiff's exhibit "F.")

A. This deed I drafted myself at the instance of Mrs. Houghtailing.

Q. Do you remember whether she was present alone or with anybody when she gave you instructions for this deed?

A. My recollection is that she was alone.

Q. Do you remember her giving you instructions in the matter? A. I do.

Q. Does this deed follow the instructions that she gave you at that time?

Mr. WITHINGTON.—I object to that, calls for a conclusion of law.

The COURT.—Objection sustained.

Mr. ANDREWS.—Do you remember the conversation which you had with Mrs. Houghtailing or the gist of it before drawing this deed?

A. I could give you the gist of it as near as I can recall.

(Testimony of A. G. Correa.)

Q. Yes?

A. Mrs. Houghtailing came into the office—I had an office then next to the postoffice, in the office before that time occupied by Mr. Vivas. What her reasons was was not clear in my mind, in any event, she came in and told me that she desired to deed some property to one of her sons; at that time I only knew, as near as I can recollect, one of the sons, which one I cannot tell you; I see there is about two or three of them in here. No, I cannot tell which one. I then told her, "Well, if you want to deed this property over to your son, [133] well and good, you can do for a dollar or five dollars' consideration and love and affection." She acquiesced in that, and in accordance with her instructions the deed was drafted.

Q. After this deed was drafted—it was to two of her grandsons?

A. As near as I can recall now, I cannot recall.

Q. You do not remember that part of it?

A. At that time I only knew one of the boys, I cannot tell you now, it is so long ago.

Q. Was it signed the same day that you drafted it?

A. No, it was not.

Q. Do you remember whether it was any length of time or shortly after that she signed it?

A. Judging from the deed, the effect of it, it was signed some time afterwards; she came into the office some time later. Now, I cannot tell you the dates or the months, the simple reason, unless I refresh my recollection from that. I then directed her to Mr. William Savidge who did all my notarial work.

(Testimony of A. G. Correa.)

Q. This second time she came in do you remember whether anyone was with her?

A. I believe one of her boys was with her.

Q. And do you remember whether or not the deed was read to her?

A. The deed was read by myself to her and explained to her.

Q. And then you sent them over to Savidge, that is all you knew? A. That is all I knew.

Q. On either of these occasions was Mrs. Houghtailing under the influence of liquor?

A. Absolutely none.

Q. You had known her a long time? [134]

A. Yes, I had.

Q. Consulted you on a number of legal matters?

A. Yes.

Q. She was capable of expressing herself on both of these occasions?

A. Certainly did, certainly was.

Q. Seemed to understand what was going on?

A. She came to me to defend one of her relations, a young lady that was work for the widow of Eddie Damon, and I defended the lady before Judge Robinson, in those days.

Q. At whose request? A. At her request.

Q. Prior—

A. I remember it was prior to this deed.

That is all.

Cross-examination.

Mr. WITHINGTON.—You say you have practiced since 1896? A. Yes.

(Testimony of A. G. Correa.)

Q. Where have you been practicing?

A. In the territory of Hawaii.

Q. Where?

A. In Honolulu the major portion of the time.

Q. How long were you in Honolulu?

A. I was admitted to the bar in all the courts of Honolulu.

Q. But you have spoken about your, you have tried cases in court? A. Yes, surely.

Q. And have spoken about your relations with Mrs. Houghtailing? I would like to know where you began to practice. A. In Honolulu.

Q. How long did you continue?

A. I continued to practice here until about the latter part [135] of 1906, and I practiced in California for, as near as I could judge, about a year, and came back to Honolulu and practiced on Maui, and since 1910, April first, I have been practicing on the island of Hawaii.

Q. Then the last occasion of your practicing in Honolulu was in 1906?

A. No, when I came from the coast, the mainland, I came to Honolulu.

Q. How long were you here then?

A. I should judge about a year, I cannot tell you offhand.

Q. What year was that?

A. Up to about the June term I should judge, in 1908 I think, about the year and a half, possibly.

Q. Now, you said you had a number of other mat-

(Testimony of A. G. Correa.)

ters for Mrs. Houghtailing before this, can you recall the first one?

A. I could not, absolutely impossible.

Q. Can you recall any of them?

A. I have just told you one instance, of this young lady related to Mrs. Houghtailing who was working for the widow of Mrs.—Eddie Damon, she, Mrs. Houghtailing, came to me to defend her, and I defended her before Judge Robinson.

Q. That was the matter of the young lady—

A. She was a relation, she was the one who employed me.

Q. I am speaking of any matters Mrs. Houghtailing, that you had charge of for her, you said a number— A. Yes, quite a number.

Q. Name one of other than this.

A. Other than this?

Q. Yes, this matter.

A. Other than this instance of this deed? I can't keep all these things in my head. [136]

Q. But you have a good, careful and accurate account of what took place in regard to this deed, and called up her suddenly, had you consulted counsel before this morning? A. No.

Q. So that you are testifying, to use an expression, off the bat— A. I have just—

Q. I am asking you, in the same way, about other matters, you say you had a number, leaving out the appearance for the relative, tell me one.

A. I cannot remember, absolutely impossible.

(Testimony of A. G. Correa.)

Q. Haven't the slightest idea of what any of them—

A. Certainly not, how could I at this time?

Q. If you haven't so efficient a memory about these other matters how is it that you are so accurate, you have so accurate a memory about this transaction?

A. As far as this particular transaction, the deed itself brings it to my memory.

Q. Then you are testifying—your testimony here is based really on this deed?

A. Why, surely, I drafted it myself.

Q. Now, let me—you say that you observed the deed is dated in June, you observed that?

A. I didn't say that, I beg your pardon.

Q. I thought you gave the exact, dated in June and acknowledged—wasn't executed—

A. I didn't say any month, I told you I think I went up to Maui during the month of June term, 1908.

Q. I didn't say anything about June, 1908, I am speaking about this deed.

A. That is the only instance I have mentioned about the month [137] of June.

Q. Let us get back, leave out the month of June, didn't you say in your direct examination in substance that you observed from the face of the deed that it wasn't executed at the time—

A. No, I told you I observed that the deed was acknowledged some time later, I couldn't tell you when.

Q. Well, do you mean to say that the deed was

(Testimony of A. G. Correa.)

signed at the time of the date of the deed and acknowledged later?

A. I did not say that, either.

Q. You cannot say that?

A. No, of course not.

Q. Now, do you have any recollection of why it was not acknowledged, you say it might have been signed?

A. I beg pardon, I didn't say that it was signed.

Q. I didn't say that you did, I understood you to say it might have been signed, may not have been signed at the time of its preparation—

A. I didn't say that it might have been signed at that time.

Q. What did you say, let us get it straight.

A. I don't know when it was signed, as far as I am concerned.

Q. Well, do you know that it wasn't signed at the time when it was prepared?

A. I could not say that positively.

Q. I think that is the substance of what I said Mr. Correa. A. I think the deed speaks for itself.

Q. I am asking for your memory, can you remember whether or not she was—she signed at the time when the deed is dated? A. No, I can't say.

Q. Now, can you say that the deed was prepared at the time when it was dated?

A. I can say this, the deed was prepared before it was signed. [138]

Q. Now, why can you recall why it was not executed at the time when it was prepared?

A. I could not tell you, tell you that, I told you that

(Testimony of A. G. Correa.)

already. I couldn't tell her reasons.

Q. I didn't ask you that question before?

A. I answered it before.

Q. You cannot tell why it was not signed then?

A. No.

Q. Now, you say that the deed was read, and the deed was explained to Mrs. Houghtailing at that time? A. Yes.

Q. Why was it read or explained—when was it read?

A. I cannot tell you whether it was after the deed was drawn or when she came in later for it, I cannot tell you now.

Q. Can you tell why there was such a time as from June to November after she came to you and had the deed drawn and came to you to have it executed, do you recall any reason?

A. I could not, not at this late date.

Q. Now, when she first came she said she wanted to convey—a deed made to her, one of her sons?

A. That is as far as I can recall, I don't know, I can't tell now.

Q. Don't you know, or do not—

A. I followed her instructions, the deed speaks for itself.

Q. Kindly answer me, you said in your direct examination something about her asking to have suggesting to have a deed to one of her sons?

A. That is what I am, I think, what I tell you is from my memory, I followed her instructions, whatever it is, in that deed.

(Testimony of A. G. Correa.)

Q. I didn't ask you, I am asking you about sometime else— [139]

A. I told you that I followed her instructions, whatever the deed says, whatever it is, the instructions are in that deed, I could not tell you from memory now about—

The COURT.—Ask the question.

Mr. WITHINGTON.—You said in your direct examination that when she first came to you that she said something about wanting to deed—a deed made of all her property to one of her sons, is that correct?

A. As far as my memory goes, I am telling you, as far as I can recall that was her conversation to me.

Q. The first time she came to you?

A. In reference to have—a deed, I cannot recall whether it was a son or grandson or nephew, whatever it is it is in the deed, in that deed.

Q. Then is this a fair statement of your testimony here,—

A. I may be in error as far as that is concerned.

Q. Let me finish, then am I right in making this assumption, Mr. Correa, that your testimony here is based on what you see in the deed, and not on the independent recollection on your part?

A. I haven't seen anything.

Q. Will you answer my question?

A. I am answering your question, I haven't read the deed over.

Q. Will you answer my question?

A. I can't answer your question because I haven't read the deed.

(Testimony of A. G. Correa.)

Q. I think you can answer my question.

The COURT.—Then you do not know to whom the land was conveyed, whether to her son or somebody else?

A. Not at this time, Judge, from as far as I can recall, the deed speaks for itself. [140]

Q. Now, on direct examination you referred to a son, you said that you believed the deed was made to her son?

A. That is my recollection, I cannot say, of course, the deed I haven't read, outside of the deed itself I cannot say which was, the son, or grandson or nephew, or what it was.

The COURT.—When you say that you are depending on your recollection from there?

A. That is all.

Q. And your recollection in that regard may be wrong?

A. As *a* I say, sure, I may be in error, I don't know, I can't be certain, positive on that score.

Mr. WITHINGTON.—Now, passing from that, the one you did recall of Mrs. Houghtailing employing you for the young lady relative, who was that?

A. I could not tell you.

Q. When was it with reference to this deed?

A. Well, I know it was after Eddie Damon's death, and this young lady was a relation of Mrs. Houghtailing, and she was working then for the widow of Eddie Damon, exactly the time, what time that was I don't know, I believe it to be prior to the execution of this deed, I may be in error also on that,

(Testimony of A. G. Correa.)

I am falling back on my recollection, I cannot be positive.

Q. Do you know what relation she was?

A. No, I can't tell you, Mr. Withington.

Q. You say the matter was before Judge Robinson? A. It was.

Q. Now, when she came to you with reference to that matter did she come with anyone?

A. Oh, I don't recall now who she came with.

Q. You say that you knew—you think at that time one of the sons, that was in 1905, that you knew—[141] A. Yes.

Q. Which one you can't say?

A. No, I couldn't say.

Q. Do you know them all now?

A. Well, I don't know that I can say that, I really don't know how many sons she has.

Q. Do you know George?

A. Do you mean the one sitting by Mr. Andrews?

Q. Yes. A. Yes, I know him.

Q. When did you make his acquaintance?

A. That I could not say.

Q. Before or after 1905?

A. It was, possibly it was about 1905, I don't want to be positive, I can't recall.

Q. Can you—do you recall the circumstances under which you made his acquaintance?

A. I don't know that I can.

Q. Can't recall that?

A. I don't think so, any particular event that I can—

(Testimony of A. G. Correa.)

(Henry De La Nux stands up at request of counsel.)

Q. Do you recognize this gentleman?

A. That is him, he is one of the De La Nux, isn't that his name?

Q. When did you make his acquaintance?

A. Oh, I couldn't tell you positively, I have known him as Mrs. Houghtailing's son, a De La Nux, some time, but I can't tell you.

Q. Have you had any business dealings with him?

A. I think I have through Mrs. Hougtailing, I am not positive about that. [142]

Q. You can't recall any more definitely, Mr. Correa?

A. He accompanied Mrs. Houghtailing to my office on some business that she, as near as I remember, was interested in, what that was I cannot now say; it may have possibly been in connection with this young lady relation of Mrs. Houghtailing; it is absolutely out of the question for me to say definitely.

Q. You say you were the attorney for Mr. Houghtailing in his lifetime?

A. The firm of Creighton and Correa.

Q. After Mr. Creighton's death you said you were—

A. After Mr. Creighton's death I did a little business for—I did a little business for Mr. Houghtailing, and after his death, done business for Mrs. Houghtailing.

Q. Was there any probate of a will, anything of that sort? A. Not that I can recall.

(Testimony of A. G. Correa.)

Q. Can you recall anything of this visit, the first one, then she went again, you say you absolutely can't recall?

A. It is long years ago, and I attended to so many clients, unless I get a diary during those days.

The COURT.—Did you draw any deeds for Mrs. Houghtailing or Mr. Houghtailing?

A. For Mr. Houghtailing.

Q. Some deeds?

A. Bills of sale, mortgages.

Q. Do you remember any particular mortgage or bill of sale?

A. No, I can't recall, Judge, many matters of that kind which were done, but I can't recall, cannot now recall, as far as I can—

Q. You recall what property Mrs. Houghtailing referred to in the drawing up of the deed?

A. Not this deed, I could not, Judge. [143]

Q. You can't recall that?

A. Outside of the deed itself, I could not.

Q. And in drawing up this deed for this land, which is your method in describing that land?

A. By metes and bounds if it can be had, likewise leases, Judge, documents of that nature, when the metes and bounds can be had.

Q. Have you ever drawn up a deed conveying land without metes and bounds, all property, something like a question of that kind, a question something similar to that in a will?

A. Yes, I have it in leases of that kind.

Q. Deeds?

(Testimony of A. G. Correa.)

A. Yes, I have had leases of that kind, I cannot say now the particular parties, I know there are instances of that kind.

That is all.

That is all.

The COURT.—Can you state positively that George had anything to do with the preparation of this deed, giving you instructions?

A. I am positive.

Q. You are positive any way that about Mrs. Houghtailing, quite positive of that?

A. Yes, quite positive of that.

Q. Are you positive, assuming that Mrs. Houghtailing came to see you first, are you positive whether somebody came in afterwards and talked over the matter with you before its final execution?

A. After it was drafted?

Q. After Mrs. Houghtailing's first visit to your office?

A. I don't recall, Judge, of any conversation in reference to that document with anyone other than Mrs. Houghtailing.

Q. Do you mean to say that you may have had some conversation with someone else? [144]

A. Mrs. Houghtailing called at the office at two times with another lady, but I can't recall now, I am quite certain this other lady did not accompany Mrs. Houghtailing in reference to this transaction, it is so long ago I can't—I am not definitely clear.

The COURT.—What I wanted to find out, whether somebody else had something to do with the

(Testimony of A. G. Correa.)

preparation of this deed outside of Mrs. Houghtailing?

A. Quite positive so far as this transaction is concerned, that no one else but Mrs. Houghtailing.

Mr. WITHINGTON.—Do you know this lady here? (Indicating Mrs. George De La Nux.)

A. This is the first time I have seen her.

Q. Did you say on direct examination that the time when she came into the office when you directed her to Mr. Savidge's office for the acknowledgment of the deed, that one of the boys came with her?

A. Yes, I could not tell you just which one of the boys it was.

That is all. [145]

Testimony of Mrs. Nancy Cullen, for Petitioner.

Direct examination of Mrs. NANCY CULLEN, called for petitioner, sworn, testifies as follows:

Mr. LARNACH.—What is your name?

A. Mrs. Nancy Cullen.

Q. You are a resident of Honolulu, Island of Oahu? A. Yes.

Q. How long have you been a resident here?

A. Twenty years.

Q. Do you know Mrs. Houghtailing?

A. Yes.

Q. You know where she lives?

A. Yes, I used to.

Q. When did you move away?

A. I didn't move away from the district, moved a little farther up.

(Testimony of Mrs. Nancy Cullen.)

Q. For how many years have you known Mrs. Houghtailing? A. Twenty years.

Q. Visit at her house? A. Yes.

Q. She visit at your house?

A. Well, very seldom.

Q. Did you visit Mrs. Houghtailing frequently?

A. Yes.

Q. Stay there any length of time?

A. Oh, I spent the day there sometimes, evenings.

Q. What have you to say about the habits of Mrs. Houghtailing in regard to sobriety?

A. She was a common drunk.

Q. How long has she been that? [146]

A. Ever since, as far as I have known her, twenty years.

Q. What was her disposition when she was drunk?

A. Very bad, worse.

Q. Was there any—were there any of her children living with her? A. Yes, two boys.

Q. Which two boys? A. Henry and Charley.

Q. Do you know whether Henry has any other place to *place* than with his mother?

A. He went to live at Maunalua after he got married.

Q. Have a place of his own?

A. I don't know whether he owned the place or not.

Q. Did you know Mrs. Houghtailing at any time while Charley was there living? A. Yes.

Q. Did you see Charley drinking there?

A. No, very seldom, just as his mother said, once

(Testimony of Mrs. Nancy Cullen.)

a year; I never saw him drunk.

Q. Do you know where Mrs. Houghtailing obtained any of her liquor? A. Yes.

Q. Where?

A. There was a Portuguese corner store, that was before the Cockett's saloon was there, she used to go down there.

Q. Did you use to see her go down there for liquor?

A. Yes, I used to go down; we used to deal there; used to see her come right out with the liquor.

Q. You know that? A. Yes.

Q. Where else did she get liquor from?

A. I don't know, maybe in town; after the saloon was there she [147] was there all the time.

Q. What saloon do you allude to?

A. Cockett's saloon.

Q. Did you see her go in Cockett's saloon?

A. She used to have to pass my gate, and I used to see her carrying a tin, every time she carried a tin she was going after beer.

Q. Do you know whether Mrs. Houghtailing had any special affection for her sons?

A. I think so, I think she thought well of her, of all her children.

Q. She thought well of all her children.

A. It was only when she was under the influence of liquor she would fight everybody.

Q. Any of these grandchildren, had she any special preference for?

A. Bathsheba, she thought a lot of the girl because she raised her.

(Testimony of Mrs. Nancy Cullen.)

Q. The daughter of whom? A. Of Henry.

Q. Could you say she had any preference for any of her sons?

A. All of them; I didn't know she had another son, never knew of this other one.

Q. Her son George?

A. Not until lately I heard she had another son.

Q. Now, what was Mrs. Houghtailing—did you ever see George's children at Mrs. Houghtailing's house?

A. No, never seen them; maybe they came there when I wasn't there.

Q. Did you go often to Mrs. Houghtailing's?

A. Off and on.

Q. How often? [148] A. Not every day.

Q. Every other day? A. Every other day.

Q. How close were you living to Mrs. Houghtailing when you were living there?

A. From that building there to here (indicating Board of Health Building).

Mr. LARNACH.—That is all.

Cross-examination.

Mr. ANDREWS.—How long was it that you used to go to her house every other day, for how many years? A. Knew her twenty years.

Q. During that twenty years you have been going to her house every other day?

A. Not every other day, but sometimes.

Q. For how many years? A. Yes.

Q. You went there every other day about—

(Testimony of Mrs. Nancy Cullen.)

A. Not every other day, sometimes.

Q. What do you mean by every other day?

A. Maybe once a week, three or four times a week, I don't know.

Q. Stay any length of time?

A. Stay a long time.

Q. Who did you use to go and see?

A. To see her.

Q. Despite the fact that she was a common drunk you used to run into to see her and stay a long time, two or three times every week? A. Yes.

Q. Was Henry and Charles there during these

A. Not every other day, sometimes.

times? [149]

A. I don't remember, I guess they used to go out to work.

Q. As a matter of fact, for years, Henry and Charles have never done any work?

A. The *boys never* there at home, I never saw them around.

Q. You told about their fighting—

A. I did not see them, I hear them from the road, you could hear them way down to King Street.

Q. Did you hear the boys? A. Well, Henry.

Q. Henry, mostly? A. Yes.

Q. He used to get pretty drunk?

A. Yes, drunk.

Q. How about his wife, she get drunk too?

A. Sure.

Q. Pretty rough house? A. Yes.

Q. The old lady, Henry and his wife, all started in, is that right? A. Yes.

(Testimony of Mrs. Nancy Cullen.)

Q. Everyone used to get drunk when you were there during these visits? A. Yes.

Q. And they used to keep it up right along, she was drunk most every day?

A. She was up and down the street drunk, even at home.

Q. And you were visiting there all these times, two or three times a week, and while you were there she was drunk, was she? A. Yes.

Q. And Henry would be drinking too and his wife, the whole [150] crowd?

A. The whole crowd drunk.

Q. That used to last all day long?

A. I guess so.

Q. Well, all the time you were there, you would be there two or three hours?

A. Oh, not that long.

Q. How long would you say?

A. When they got too rough I would go home, I was only a young girl.

Q. Liquor was free to everyone that came in, and could have their drinks free?

A. I was a young girl—

Q. Liquor was free to anyone, had plenty of liquor in the house? A. Yes.

Q. And the only one of the family that you never saw there was George?

A. Yes, I don't remember seeing him there.

Mr. ANDREWS.—That is all.

Mr. LARNACH.—That is all.

Testimony of Mrs. Agnes Robello, for Petitioner.

Direct examination of Mrs. AGNES ROBELLO, called for petitioner, sworn, testified as follows:

Mr. LARNACH.—Your name, please?

A. Mrs. Agnes Robello. [151]

WITNESS.—I would rather speak in Hawaiian, I do not understand English.

(Interpreter called.)

Mr. LARNACH.—How old are you, Mrs. Robello? A. Forty-five.

Q. How long have you been living in Honolulu?

A. I belong to Honolulu, I was born here.

Q. Where have you been living for the last twenty-five years in Honolulu? A. Kalihi.

Q. Near the residence of Mrs. Houghtailing?

A. Yes.

Q. How close are you living to the residence of Mrs. Houghtailing now?

A. Between here, between one hundred and two hundred feet, about approximately that.

Q. Have you been living there for the last twenty years or more? A. Yes.

Q. Have you ever lived at the house of Mrs. Houghtailing? A. Yes.

Q. For what period of time?

A. I stopped there quite a number of times. Sometimes a few weeks, sometimes a month, sometimes almost a year.

Q. You know anything about Mrs. Houghtailing's habits as to whether she indulged or not in liquor, or not? A. Yes.

(Testimony of Mrs. Agnes Robello.)

Q. Did she indulge in intoxicating liquor?

A. She was a hard drinker, drink liquor every day, she would start in sometimes drinking for a week or two weeks steady.

Q. When did you first observe Mrs. Houghtailing's indulgence in the excess of intoxicating liquor? [152]

A. That is when she was stopping with my brother, and she—that was for a number of years.

Q. How long ago was that?

A. This time she was stopping with my brother was about thirteen or fourteen years ago.

Q. For how long has that been, drinking by Mrs. Houghtailing, how long did that continue?

A. I know it is only lately when prohibition came in that she stopped, if she got liquor now she would, she will be drunk.

Q. Now, while you were at Mrs. Houghtailing's house did you ever see her sons there? A. Yes.

Q. Whom did you see there of her sons?

A. Henry and Charley.

Q. Did you ever see George there?

A. No, only sometimes, sometimes one week and go.

Q. Have you ever seen George there or any of George's children at Mrs. Houghtailing's?

A. The only time I seen them come there and go back again.

Q. Whom do you mean by they, George's wife or who else?

(Testimony of Mrs. Agnes Robello.)

A. I do not know for sure about the children, the wife is what I know.

Q. And how about Henry's wife and children, did you see them visit there at Mrs. Houghtailing's house? A. They stopped there.

Q. Did you ever hear of Mrs. Houghtailing express any particular fondness for any of her sons?

A. Not express wish for one—express affection for one.

Q. How about the grandchildren?

A. She had love for all the children.

Q. You heard her express it to you? [153]

A. Yes, she has expressed that, but when she is drinking she make expressions, when afterwards you tell her she don't remember.

Q. How about the grandchildren, have you ever heard Mrs. Houghtailing express any special preference for any of those?

A. I have heard her say, "This is my grandchild, —this is my grandchild that I love."

The COURT.—Did she have any favorite?

A. I don't know anyone specially.

Mr. LARNACH.—Do you know if Kulumanu lived with Mrs. Houghtailing?

A. Yes.

Q. How long a period of time did she live with Mrs. Houghtailing?

A. Well, quite a number of years she lived there.

Cross-examination.

Mr. ANDREWS.—You first lived there as I

(Testimony of Mrs. Agnes Robello.)

understand it, about thirteen or fourteen years ago when you first noticed Mrs. Houghtailing drinking, is that right?

A. I knew she was drinking before, I saw her drunk before that, I wasn't acquainted with her at that time.

Q. That was the first time you knew, that you saw with your own eyes?

A. I knew she was a hard drinking woman—

Q. —that you saw with your own eyes that she was a hard drinking woman, is that right?

A. I saw her before that drinking, but I wasn't acquainted with her before that time.

Q. Well, then, after you got acquainted with her—withdraw the question. [154]

Q. You said that Henry and Charley, Henry and his wife and children were stopping with her, is that right?

A. Yes, sometimes they stopped there, sometimes went down to Maunalua.

Q. How much of the time did they stop there?

A. I think most of the time she was stopping with her mother.

Q. Who was supporting them while you were there?

The COURT.—They were stopping there with the mother? A. Yes.

Mr. ANDREWS.—Who was supporting them when they were there?

A. I saw—as far as I saw the mother supported them, but some times they went to work.

(Testimony of Mrs. Agnes Robello.)

Q. Now, both Henry and his wife, drank heavily didn't they? A. Yes.

Q. And did Charles and his wife live there too?

A. Charles didn't drink as much as Henry; sometimes he stopped there, but sometimes he went down to Maunalua.

Q. He didn't drink as heavily as Henry?

A. He drank, he did drink and his wife.

Q. Yes, he drank, but not to excess like Henry.

A. Yes.

Q. Most of the time did Charles live there with his mother or most of the time down at Maunalua?

A. I can't say for sure, because he would stop at his mother's for a long time and then go down to Maunalua and stop a long time.

Q. During the time that he was stopping at his mother's did his mother support him?

A. At sometimes when he was out of work.

Q. How often was he out of work and stopped there?

A. That boy was working most all the time, but there was some [155] times when he did not have work.

Q. Now, was Mrs. Houghtailing drunk or sober when she used to express affection for her children, and grandchildren? A. Drunk.

Q. Was she very—was she able to take care the house, look after the house as head of the house?

A. When she was drunk she could not take care of the house, I was the one that took care of the house.

Q. Generally speaking, did she take care of the

(Testimony of Mrs. Agnes Robello.)

house, look after it, or did you have to look after the house?

A. When I was stopping there when she would get drunk everything would be scattered around, she could not fix the house, and I would have to fix the house.

Q. How long did you stay there?

A. A long time sometimes, stopped almost a year.

Q. Right up to what time?

A. I can't say for sure, sometimes I went to work for the pineapple company.

Q. When was the last time you stopped there?

A. About two or three years back.

Q. And during all this time that you stopped there with Mrs. Houghtailing, she took care of you, supported you too?

A. Yes, she took care of me, gave me food.

Q. One witness testified that there used to be big fights in the house between her and Henry and Henry's wife when they were drunk together, is that right?

A. Yes, I have heard them squabbling.

Q. Were these pretty bad squabbles?

A. Yes, when she would get into a dispute when she was drunk, talked pretty bad.

Q. How about Henry and his wife, talk bad too? [156]

A. When Henry was drunk he would go to sleep.

Q. Did they have any fights, Henry and his wife and she? A. No.

Q. Now, when they were having these rows that

(Testimony of Mrs. Agnes Robello.)

you talk about, was anything thrown, things at one another?

A. They had a big row at one time, and I wasn't there, but when I got back as far as the fence it was over, I don't know what was done at that time.

The COURT.—(12 o'clock.) This case will be continued until to-morrow morning at nine o'clock.

Testimony of Henry De La Nux, for Petitioner.

Direct examination of HENRY DE LA NUX, called for petitioner, sworn, testified as follows:

Mr. LARNACH.—Your full name?

A. Henry E. De La Nux.

Q. Your residence? A. Kamehameha IV Road.

Q. Near that of Mrs. Houghtailing's? A. Yes.

Q. What relation are you, if any, to Mrs. Houghtailing? A. I am her son.

Q. How long have you lived at that place that you are now living?

A. About twenty-four years, off and on.

Q. When you were not living there where else were you living? [157] A. At Maunalua.

Q. In your own house or a rented house?

A. No, my wife's house.

Q. What is your business at this time, Mr. De La Nux? A. At this time, pipe-fitting.

Q. How long have you been at that line of business? A. Now you mean?

Q. Yes?

A. I have been with—about three years now.

Q. Working steadily? A. Yes.

(Testimony of Henry De La Nux.)

Q. Where were you educated, Mr. De La Nux?

A. Here in Honolulu, at St. Louis College.

Q. After you left St. Louis College, where did you go, to work, or—

A. Yes, I went to Hawaii with my uncle to work in the mill.

Q. In what capacity?

A. First I was scale man, then worked for sugar chemist, then worked with my brother George helping him around the sugar plant.

Q. Where was that? A. Paauhau plantation.

Q. What did you do further?

A. Then I helped, in the engineer's department.

Q. Still on Hawaii? A. Still on Hawaii.

Q. Now, when did you leave Hawaii to come to Honolulu to stay?

A. I don't know exactly what year it was.

Q. About? A. I think it was 1895.

Q. Did you come to Honolulu to work, or for a vacation?

A. No, I came to Honolulu to stay. [158]

Q. Were you married at that time? A. No.

Q. What did you do when you arrived, did you go to work?

A. No, not right away; I didn't know the town; I met a friend of mine down on the Alakea wharf building that fish market, he got me a job on the old Kohala, a saller—

Q. How long did you work there in the capacity—

A. I worked three weeks, the ship got wrecked down at Kohala.

(Testimony of Henry De La Nux.)

Q. What was your next?

A. I went down to see my brother George to pay him a visit.

Q. How long did you remain there?

A. Oh about three weeks.

Q. And returned to Honolulu?

A. I returned to Honolulu and worked for the Waipahu plantation.

Q. How long did you remain with the Waipahu plantation? A. Eleven months.

Q. Then what did you do if anything?

A. Came back to work with the plumbers, Ben Aiea.

Q. Where did you live in Honolulu working for Ben Aiea? A. Lived at my mother's house.

Q. Were you married or single at that time?

A. Single.

Q. When did you marry, what year?

A. 1897, I think, something like that.

Q. Now, during all that time did you—were you a drinking man or a prohibitionist?

A. Do you mean while I was here?

Q. Yes, while you were in Honolulu?

A. Yes, I started to drink when I got here.

Q. What started you? [159]

A. Well, when I came to her, I didn't know how to eat raw fish and, or poi, so my mother she had nothing but raw fish and poi and stuff around there for me to eat, I couldn't eat it, so she brings out a bottle of gin, to try this stuff, I take down a little gin, in a little while I get kind of drunk, I don't know

(Testimony of Henry De La Nux.)

whether I was drunk or not, and I started in with this fish, raw fish; of course, the next day, of course, the same thing, and after that I wanted gin instead of raw fish, that kept me drinking up to about a year ago.

Q. Now, during the period of time that you have lived with your mother, and lived in your mother's house, what have you to say with regard to your mother's habits, particularly as to sobriety?

A. Well, ever since I came here I know her to be a drunkard.

Q. Using liquor to excess you mean by that?

A. Yes, keeps it up.

Q. Did you ever see your brother George visit your mother's house while you were living with your mother? A. Yes.

Q. Did your brother George's family visit there?

A. Yes.

Q. Was there liquor used by any of the family at that time when George was visiting? A. Yes.

Q. Did you ever see George indulge with the rest of the family? A. Sometimes.

Q. Did you ever see any liquor brought by any of the members of the family to your mother's house?

A. Yes.

Q. Who, for instance, would bring liquor?

A. George himself.

Q. What kind of liquor? [160]

A. Sometimes whiskey, sometimes gin.

Q. Did he—what would he do with the liquor when he brought it to the house?

(Testimony of Henry De La Nux.)

A. Well, sometimes bring it into the kitchen and leaves it there, of course when they want a,—I want a drink I go and open it.

Q. Did you ever see your mother indulge in liquor when your brother George was there? A. Yes.

Q. To excess? A. Yes.

Q. Now, what were the relations between your mother and George, were they friendly or unfriendly, we will say for the last fifteen years—say, around 1900 or 1902 or 3, were they friendly or unfriendly?

A. Yes, friendly.

Q. Did they continue that way right along from that time on?

A. No, continued up to the time when we heard about the case, about her giving a deed, and lawyer, concerning this case—up to that time that I know of, of course about the row, I don't know nothing about it.

Q. Was there any period of time that George didn't visit your mother's house from 1903 up to the present time?

A. No, it was never 1903, I think it is between 5 and 6 years I think that he never visited her.

Q. You do not remember between what years it was? A. No.

Q. Did your brother George—withdraw that—did you ever learn from any of your family that there was a deed made by Mrs. Houghtailing to her two grandchildren purporting to convey all her property? [161] A. Yes.

Q. From whom did you learn that?

(Testimony of Henry De La Nux.)

A. My brother Charley.

Q. When was that, what year was that about?

A. That I can't remember.

Q. Did any other member of the family ever tell you that there was such a deed?

A. It was only my mother after I asked her about it.

Q. When was that, do you remember, was it long ago or a short time ago?

A. Yes, about 1916, I think.

Q. Did you ever ask your brother George about—concerning such a deed?

A. Never asked him anything about it, but wrote him a letter once.

Q. Did he reply? A. No.

Q. He did not? A. No.

Q. Did he ever tell you there was such a deed?

A. He?

Q. Yes?

A. No, never said a word to me about it.

Q. Now, when your mother drank to excess what was her condition, could she undertake her ordinary business or was she helpless or just what was her condition? A. She was perfectly helpless.

Q. Do you mean physically or mentally?

A. Both.

Q. Was she pleasant under the influence of liquor or hostile?

A. Well, sometimes when there is outsiders there she is pleasant with them, when she wants more drink she questions me and I won't go and get it, then there

(Testimony of Henry De La Nux.)

is a row between she and I. [162]

Q. Do you know whether your mother had anyone to act as her agent or conduct her affairs during the last fifteen or twenty years? A. Yes.

Q. Who? A. Mark Robinson, the old man.

Q. That is, the father of Lawrence Robinson who was on the stand? A. Yes.

Q. Do you know whether Mr. Lawrence Robinson ever represented your mother in that same capacity?

A. Before that time, I don't know; after, sometimes, she used to be so sick over liquor, she gives me a note and I goes down town and get money from this Mr. Robinson and this boy Lawrence.

Q. Now, did any of your children ever live with your mother, Mrs. Houghtailing for any period of time? A. Yes.

Q. Anyone in particular? A. Bathsheba.

Q. She is one that is now dead? A. Yes.

Q. How old would she be if living at this time?

A. Be nineteen years and four months.

Q. She died how long ago? A. February 12th.

Q. Of this year? A. Yes.

Q. What were the relations existing between Mrs. Houghtailing and that niece of hers—grandchild?

A. Well, she always said that was her only grandchild, all the time, drunk or sober, to most of the people that came [163] around there; of course that is how she got the name of Bathsheba, from Mrs. Allen.

Q. Do you know—

(Testimony of Henry De La Nux.)

The COURT.—Mrs. Allen was a sister of Mark Robinson?

WITNESS.—I think so, of course I don't know.

Mr. WITHINGTON.—Mrs. Allen—the senior Robinson had a son who is the father of Mrs. Houghtailing; all the rest of the family, Mrs. Allen, Mrs. Foster, and the rest, Mark Robinson, are of one family; she is the only living descendant.

The COURT.—Half brother of that family?

Mr. WITHINGTON.—Yes.

Mr. LARNACH.—Now where were you working when—if you were working, around 1904 and 1905?

A. In 1904 and 1905 I was working right in Honolulu as a plumber.

Q. Did you ever work at any time down at Aiea?

A. Yes.

Q. When? A. The year I don't know.

Q. Was it after 1905 or before? A. After.

Q. How long after?

A. About a year after, I think.

Q. Were you living near to your brother George?

A. Yes.

Q. Who were you working for, your immediate boss?

A. He was supposed to be my boss at the pumping station.

Q. That was after the year 1905? A. Yes.

Q. Now while you were down at Aiea working under your brother George did your brother George tell you anything about this deed? [164]

A. No, not a word.

(Testimony of Henry De La Nux.)

Q. That is in this controversy? A. No.

Q. Did you ever visit your brother George's house?

A. Yes.

Q. Did you see Mrs. De La Nux, Lahapa?

A. Yes.

Q. Did she ever tell you about this deed that your mother was supposed to have made? A. No.

Q. But you say you did not find out about this deed until somewhere about1916, didn't hear about it? A. Yes, something like that.

Q. Now when your mother was drinking, indulging to excess in liquor, did she eat, take care of herself, or what was her habit?

A. No, she didn't eat, she didn't take care of herself, didn't care for anything but liquor.

Q. Now how often would your mother indulge to excess in liquor?

A. Most every day in the week, including Sundays.

Q. Now during that period of time what were the relations existing between yourself and your mother, friendly or otherwise?

A. Well, sometimes friendly, and sometimes of course through liquor we got in a row because when I didn't open the bottle of gin fast enough there is a row.

Q. Now were you simply, all of you, around the house drinking, doing nithing else, or did you go to work during, say, the last ten years?

A. Well, when I am drinking, yes, why I lay around the house, [165] when I get sobered up I go to work.

(Testimony of Henry De La Nux.)

Q. Did you lie around the house for any period—any length of time?

A. Well, sometimes about a month, then I go to work about three or four months, then I get enough money to buy booze, stay home and drink it up and go back to work, and so on.

Q. What were the relations between your mother and her grandchildren—were they friendly or otherwise? A. Friendly.

Q. Was she friendly to all of them?

A. All of them, because she named all of them herself.

Q. How about Charley, was she friendly to Charley?

A. Yes, most of the time; of course Charley wasn't as heavy a drinker, of course when she starts to rough house with Charley of course he is gone; me being drunk I stay there.

Cross-examination.

Mr. ANDREWS.—Were you, when you first came back to Honolulu, 1901 or 1902, at that time was your mother a regular drunkard then?

Mr. WITHINGTON.—1905.

Mr. ANDREWS.—All the time, when he came back in 1905? A. From Hawaii?

Q. Yes, the last time? A. Yes.

Q. She was what you call a regular drunkard then?

A. Yes.

Q. That is, she was drunk every day, including Sundays? A. Yes.

(Testimony of Henry De La Nux.)

Q. And drunk so that she got paralyzed, as you say, is that [166] right?

A. No, I didn't say she got paralyzed, drunk.

Q. You said so to Mr. Larnach, that she got physically and mentally helpless, that he asked you if you mean physically and mentally, and you said both; is that so, she got drunk every day, about?

A. Not every day; no.

Q. How often?

A. About two or three days in the week.

Q. That would keep, that kept up, right up to when? A. That keeps up for months.

Q. Until what year?

A. I don't remember the year.

Q. How many years ago did she stop getting that way, when prohibition came?

A. About a month before that.

Q. About a month before prohibition? A. Yes.

Q. That was in 1918? A. Yes.

Q. Up to that time, every day, every week, she was drunk?

A. Not exactly drunk, but she has got liquor in her every day and every week.

Q. How many times during that time during the week would she be what you would say, regularly—a regular drunk?

A. Three or four times a week.

Q. Three or four times a week she would be regularly drunk?

A. Yes, just get drunk with liquor, didn't eat anything.

(Testimony of Henry De La Nux.)

Q. Helpless?

A. Not every day in the year.

Q. Three or four times a week, you said?

A. Yes. [167]

Q. Now, then, both you and your wife drink heavily, don't you? A. What is that?

Q. Both you and your wife drink heavily, don't you? A. My wife drinks heavily sometimes.

Q. That is, she used to get drunk, too?

A. Yes.

Q. And then how often a week would she get drunk?

A. Maybe once a week, sometimes once a month.

Q. Do you mean by that, drunk, you mean, helpless, very drunk?

A. No, drunk, what I mean, staggering around.

Q. Every day your wife would take something to drink just like your mother?

A. No, not every day.

Q. Then, as I understand, you would work a little while, to get enough money to buy booze and then drink it until you got through with it? A. Yes.

Q. That lasted up to a year ago? A. Yes.

Q. And the only time you worked when you were out of money and couldn't get any liquor?

A. Yes.

Q. Now, then, during all this time while you were drunk, who kept your family and you, the old lady?

A. While I was drunk?

Q. Yes. A. Yes.

(Testimony of Henry De La Nux.)

Q. She took care of all your folks—and your folks? A. Yes.

Q. In fact, she spent everything for meals, everything, when you were living at her house?

A. While I was drunk. [168]

Q. You are living there now at her house?

A. Yes.

Q. You live at the same house? A. Yes.

Q. Now, your family live, not in the same building with your mother?

A. No, it is only about 1901 when we went to live in the little house by myself.

Q. Belongs to her? A. Yes.

Q. Don't pay any rent? A. Yes.

Q. You all eat together? A. No.

Q. Eat separately? A. Yes.

Q. Now, during all these years,—well, how long did you work for George down at Aiea?

A. Oh, between three and four months, I think.

Q. Then he had to let you out on account of your drinking?

A. No, he didn't let me out, the chief engineer let me out?

Q. You were let out? A. Yes.

Mr. ANDREWS.—That is all—oh, just one more question.

Q. Charlie and his family during these years that you tell about, they lived at the house, too?

A. Sometimes.

Q. Well, how much of the time?

(Testimony of Henry De La Nux.)

A. Sometimes two or three months, sometimes two or three weeks, of course.

Q. Then where would they go?

A. Then go down to Maunalu with his wife's folks.

Q. His wife own the place down there? [169]

A. Yes, his wife's folks.

Q. Live with his wife's folks a little while and then come back, is that right? A. Yes.

Q. He lived in a house belonging to his wife's folks down at Maunalua? A. Yes.

Q. Who supported his wife's family down at Maunalua?

Mr. WITHINGTON.—We object to that, that is not—

Objection sustained.

That is all.

Redirect Examination.

Mr. LARNACH.—Q. When Charley and his wife lived with your mother, why your mother supported them, too, bought food, meals, for all of them?

A. That I don't know.

Q. Well, they eat with you, didn't they, all eat together? A. No.

Q. Didn't eat with you folks?

A. No, I get up out of bed and help myself, I don't know nothing about them.

Q. They lived in the same place? A. Yes.

Q. They ate at the same building, she was feeding them?

A. That might be, but for us, I don't know.

That is all. [170]

Testimony of Charley De La Nux, for Petitioner.

Direct examination of CHARLEY DE LA NUX, called for petitioner, sworn, testified as follows:

Mr. LARNACH.—Your full name, please.

A. Charles A. De La Nux.

Q. Where do you live, Mr. De La Nux?

A. At Castner.

Q. On this island? A. Yes, Honolulu.

Q. Are you married? A. Yes.

Q. What is your business?

A. I am foreman carpenter.

Q. Working for who?

A. Working for the Construction Quartermaster United States Army.

Q. How long have you worked in that capacity?

A. Five years.

Q. Prior to that what was your business?

A. Prior to that I was working for the Lord Young Engineering Company.

Q. How long did you work for them?

A. Since 1911 or '12, if I am not mistaken, I am not sure, ever since I quit the plantation.

Q. What do you mean by "quit the plantation"?

A. Well, before that I working at the pumping station.

Q. Where?

A. At Eiea plantation, Waimalo.

Q. Is that where your brother George works?

A. Yes.

Q. Same plantation?

A. Yes, same plantation. [171]

(Testimony of Charley De La Nux.)

Q. When did you go to work there, Mr. De La Nux?

A. At the time of the strike, Japanese strike. I couldn't exactly tell you.

Q. How long did you stay there?

A. I stayed there three years on the plantation.

Q. And your brother George saw you working there?

A. Yes. I worked for him seven months, I believe, and I was transferred from his station over to Waimalo, and I stayed there a little over two years and some months, it was September or October when I left the plantation.

Q. Did I understand you to say that you were two years at Waimalo?

A. Two years and some months at Waimalo.

Q. That is another plantation?

A. That is the same plantation, but only a different section.

The COURT.—You worked altogether about three years at Aiea?

A. Three years at the Aiea pumping stations, both stations, on the same plantations.

Mr. LARNACH.—Did your brother George know you were working down there? A. He did.

Q. Never gave him any idea that you were loafing down there?

A. No, I had charge of one station down there.

Q. Now, have you lived for any length of time with your mother, Rebecca Houghtailing, here in Honolulu?

(Testimony of Charley De La Nux.)

A. Well, I couldn't say, perhaps a week or a month or so, sometimes a month, then I would go and stay away for a year or more.

Q. Before you were married where did you live?

A. At home.

Q. What home, do you mean Mrs. Houghtailing's?

A. Yes. [172]

Q. When were you married?

A. About sixteen years ago, I believe.

Q. What did you do with your belongings, when you would live at some place other than home, than the home of your mother, did you take them with you? A. Yes.

Q. And bring them back when you returned to your mother's home, is that what you mean?

A. Yes.

Q. Now, are you a drinking man, Mr. De La Nux?

A. Well, I wouldn't say I was a teetotaler,I drink sometimes.

Q. Drink to excess?

A. Well, not to excess; have been pretty heavily loaded, so I can say that.

Q. Do you indulge in that frequently? A. No.

Q. Have you ever indulged to excess in your mother's home here in Kalihi? A. Yes.

Q. Frequently?

A. Well, not frequently, can't say frequently; it will depend on just how I feel, sometimes I drink, then I will let it go for quite awhile.

Q. Did you ever drink to such an extent that it interfered with your work, going to work?

(Testimony of Charley De La Nux.)

A. No, never did.

Q. How about your mother, did she indulge in liquor? A. Yes.

Q. To excess? A. Yes.

Q. How far back can you remember your mother indulging in liquor [173] to excess?

A. Ever since I came to Honolulu.

Q. When did you come to Honolulu?

A. When I was thirteen years old, or almost fourteen.

The COURT.—How old are you now?

A. Thirty-seven.

Mr. LARNACH.—What was her condition when she indulged to excess, was she bright and cheerful, able to attend to her affairs?

A. No, boisterous, rowdy, looking for a fight all the time.

Q. Now, around the years 1904 where were you living? 1905? A. Maunalua.

Q. And did you visit your mother's house during that period? A. Yes.

Q. Did you hear anything about the execution of a deed by your mother, about that time? A. No.

Q. Later on? A. Later on I did.

Q. Do you remember anything about the execution of the deed—did you hear anything about the execution of the deed? A. Yes.

Q. Tell us when you first heard it, of any such occurrence.

A. Might be around 1909 or 1908 when I first heard it.

(Testimony of Charley De La Nux.)

Q. Then how did you happen to hear it?

A. She came to my house and told me about it when I was living at Deaha Lane.

The COURT.—Were you not married then?

A. Yes, I was married.

Q. When were you married?

A. I couldn't exactly recall the year, I think it is about sixteen years ago.

Q. What were you doing down in Maunalua? [174]

A. I was living there at the time with—at my wife's place; then it is too far away from my work; I was working for Link McCandless' building, at the Armstrong block, corner River and King Streets, so I moved down to Desha Lane and lived over there.

Q. Where were you living in 1905?

A. In 1905 I was down at Maunalua, I believe, but around 1908 or 1909 when I moved down to Desha Lane, that is when I first heard of it.

Q. How long did you live down at Maunalua?

A. Well, off and on, I believe for a good number of years.

Q. About that time—about what time?

A. Maybe two years or so.

Q. You were not living with your mother in 1905, 1904 or 5?

A. No, when I got married I moved to Maunalua, that is where I lived, in one of Sam Damon's—

Q. You used to come to your mother's house?

A. Yes, that would be off and on.

Q. When was your child born?

(Testimony of Charley De La Nux.)

A. Born in her home.

Q. When, that is fourteen or fifteen years ago?

A. The year after I was married.

Q. You don't know when you were married? You don't remember?

A. No, I don't remember, I don't recall, unless I trace it back, I may have seen *the seen* the date, but it is about sixteen years ago.

Q. How old is your youngest child, the one living now, who is ten, I believe now?

A. Yes, he will be eleven next year.

Q. When was the first child born?

A. Born February twenty-second I think, I can't remember the year. [175] About 1904 or three, I think, I never kept a record of it.

Q. Well, the child is dead now?

A. Yes, he died when he was four months old, and the second child was not born until five years later.

Q. Five years after the first child? A. Yes.

Q. Now, how old is your second child now?

A. He is going onto his eleventh year.

Q. So the first child would be about fifteen years?

A. About fifteen years, he was born the year after I was married.

Q. Born about 1903? A. Yes.

Q. At your mother's place?

A. Yes, at my mother's place. At that time I was working for Mr. Cockett attending bar for him—no, the first child was born at Maunalua. She was up at the house the evening before the child was born.

Q. Your wife was?

(Testimony of Charley De La Nux.)

A. Yes, she rushed home and had her child at home at Maunalua, at her mother's house.

Q. Were you working for Mr. Cockett in 1905?

A. Yes, tending bar for Mr. Cockett.

Q. Your mother buying liquor from that place?

A. Yes.

Q. Did you use to sell liquor to her?

A. I don't know, it is my business to give it to anybody who came for it; of course she wouldn't come direct herself, always be somebody else, women could not come into the saloon, and I never had anything to do with the bills; all I did was to pass it over the bar, whoever who came for it. [176]

Mr. LARNACH.—What was the character of the place, was it a light wine and beer—

A. Light wine and beer.

Q. During that time were the relations between yourself and your mother friendly or otherwise?

A. Yes, I used to call up there quite often.

Q. And you have referred to your wife bearing her child in 1903? A. Yes.

Q. Is that your present wife? A. No.

Q. What became of that wife you referred to as bearing a child in 1903? A. She is dead.

Q. And your present wife, Mrs. Charles De La Nux, you married her about— A. 1915.

Q. You have stated that at no time did your brother George discuss with you the making of the deed by Mrs. Rebecca Houghtailing, a deed conveying all of her property or purporting to convey all of her property, to George's two children?

(Testimony of Charley De La Nux.)

A. No.

Q. Sure of that? A. Oh, yes, quite sure of it.

Q. Now, what did your mother say when she came to your house in Desha lane and told you about making the deed?

A. She says, "Son," she says, "I have done something wrong to you." I asked her what it is, "Oh, I will tell you some day."

Q. Was that all that was said? [177]

A. That is all.

Q. That is all you knew about it?

A. That is all I knew about it, yes.

Q. Then you didn't know at that time that it was a deed that did the wrong? A. No.

Q. When did you find out the wrong that she had done?

A. It was some time afterward through Mrs. Richard, I found out.

Q. Do you remember whether that was five or six years after or two months, how long after this first conversation you had with your mother?

A. About two or three years.

Q. Is that just an estimate or a guess? A. Yes.

Q. Can you fix it up to any instance, or incident?

A. Yes, I can fix it up to an instance.

Q. What instance?

A. Through a trouble that occurred at the house.

Q. Were you there?

A. No, I wasn't there, I was working at the pumping station at that time.

Q. Near your brother George? A. Yes.

(Testimony of Charley De La Nux.)

Q. Did you hear from your brother George of the trouble that had occurred?

A. No, heard it from other sources.

Q. Did he ever discuss with you the trouble that occurred with his mother? A. No.

Q. Regarding,—or what caused that trouble?

A. No. [178]

Q. Were you visiting George's house at that time?

A. Yes.

Q. Friendly?

A. Yes, there was just a fence between his house and mine.

Q. How many feet, how far away did George live with his family? A. About forty feet.

Q. Did you use to visit the house when your mother was married to Mr. Houghtailing when Mr. Houghtailing was living, did you visit your mother's home when he was alive?

A. No, I stayed away as much as I could, Mr. Houghtailing and I didn't quite agree.

Q. Do you know what business Mr. Houghtailing was in? A. Liquor business.

Q. Do you know whether or not the Houghtailing home, and your mother's home was supplied with liquor during that time, that period?

A. Well, I can't say so much about the Houghtailing home, but my mother's home was supplied with liquor by Mr. Houghtailing.

Q. That you know? A. Yes.

Q. Did you ever write to your brother George about the deed that we have discussed? A. No.

(Testimony of Charley De La Nux.)

Q. Then, as I understand you, you never at any time discussed the deed with your brother George?

A. Never.

Q. At no time has your brother George discussed with you the deed or referred to it in any way?

A. No. [179]

Cross-examination.

Mr. ANDREWS.—I understand, Mr. De La Nux, that about 1908 your mother came to visit you on Desha Lane and said, "I have done something wrong to you," is that right? A. Yes.

Q. It was at the place you were living at Desha Lane she said that? A. Yes.

Q. She just said, "I have done something wrong to you, I will tell you about it some day"? A. Yes.

Q. From this you believed it was the deed she was talking about?

A. No, I didn't believe anything at all, I tried to find out, but she wouldn't tell me, that is all, I never had no ideas about deeds or anything else.

Q. You knew that she had done something—

A. She wouldn't tell me what it was.

Q. She wouldn't tell you? A. I suppose so.

Q. That is the way it impressed you?

A. Yes. She knew she had done something and didn't want to tell me.

Q. Something they took away that ought to belong to you wasn't that the idea, is that right, she gave a deed—

A. Whether she done me any wrong or done somebody else or herself wrong, but she said, she had done

(Testimony of Charley De La Nux.)
something wrong to me, and tell me some day.

Q. Something wrong to you?

A. Yes, something wrong to me and she would tell me some day.

Q. Then about two or three years later you found a deed put [180] on record, that would be about 1910? A. Yes.

Q. You found it had been put on record, giving all her property to George's two children, sons?

A. Yes.

Q. You never said anything to George and he never said anything to you from that day to this, is that right?

A. George to me and I to George, no.

Q. You and his family have not been on good terms, and with George for a long time?

A. I can't say that I have not been on good terms with George and his family for a long time; as far as I am concerned, I had nothing against him until this thing came up, and I passed him on the street, he didn't talk to me and I did the same.

Q. As a matter of fact drinking with your mother, and a few people living up there, had a good deal to do with it? A. A good deal with what?

Q. Trouble between you and George?

A. No, not at all.

The COURT.—Were you talking to your brother George right up to 1916 or 1910? A. Yes.

Q. When did you quit talking to George?

A. As soon as the suit was brought up, three years ago.

(Testimony of Charley De La Nux.)

Q. Well, you found out in 1910 or thereabouts that this deed had been made by your mother? A. Yes.

Q. But did you keep talking to your brother, then?

A. Yes.

Q. Kept talking to him? A. Yes. [181]

Q. Up until this suit was brought in 1916?

A. Yes.

Q. Didn't you ask him about it at all?

A. No, I never did.

Q. Were you a little put out about it?

A. Why, yes, in a way, I was.

Q. Did you talk to your mother about it?

A. I did.

Q. What did she say?

A. She said she wanted to straighten this thing out, and I said, "Why don't you go and consult an attorney," that is all; that is how this started.

Q. Did you not say a word to George about it?

A. No, never did.

Q. Why didn't you?

A. Well, that is something I can't answer; I believed it was her duty, if she thought she had done wrong, to straighten it out herself, whatever you think, it is up to you, it is yourself, whatever you want to do do it; I never asked her for anything for myself. It is up to you, Mama, if you want to do it, just go ahead."

Q. After the suit was brought, your brother refused to look at you, passed you on the street?

A. Yes, I passed him many times since then; he wouldn't look at me and I did the same.

(Testimony of Charley De La Nux.)

Q. Did your mother show more affection toward one boy than toward another.

A. Well, not that I could see; I suppose as far as I am concerned, I was the black sheep of the family, didn't care very much for me, so I kept away from home as much as I could. My [182] brother Henry, he was her favorite.

Q. Henry was her favorite son?

A. Yes, she always said so.

Q. How about the grandchildren?

A. Well, I wouldn't say as to that; her expressions were always in Hawaiian; I didn't understand Hawaiian very plainly unless they talked very slowly.

Q. Have you ever seen—at about that time, 1905, did you see George's children at your mother's place at all?

A. No, I can't say that I did, they were very seldom there.

Q. Did you see any of the grandchildren at all at that time? A. My brother's, I believe, Henry's.

Q. Did you see them there whenever you called there?

A. Well, they were living there mostly all the time.

Q. Did you observe how the grandmother was treating them?

A. She treated her eldest grandchild, as I might say, a pet.

Q. Bathsheba?

A. Bathsheba, yes, being her first "mapuna."

Q. That is, "My Punanele"?

A. Everything was "first mapuna" as far as I

(Testimony of Charley De La Nux.)

understand the Hawaiian language.

Redirect Examination.

Mr. LARNACH.—What did you learn from Mrs. Richards, that there was a deed, or did you learn that it was a deed purporting to convey all the property—

Mr. ANDREWS.—We object to that as not redirect; I never brought out anything about Mrs. Richards.

The COURT.—I will permit it.

Exception.

WITNESS.—Well, from what I learned from Mrs. Richards, it seems my mother had made a deed giving all her property to [183] George.

The COURT.—To George?

A. To George's children.

Q. To George's children?

A. To George's children, I should say, but previous to that I heard that the home was given to him, the Kalihi homestead was given to him.

Q. To George?

A. Yes. I was under the impression all the time, until Joe Clark abstracted the deed, that is when the trouble started.

Q. When did Joe Clark abtract the deed giving the information that it was all the property?

A. 1910.

Q. Sure of that?

A. Yes, I believe, that was when the trouble started, if I am not mistaken.

Q. What do you mean about the trouble?

A. Why this bringing up of this suit, she con-

(Testimony of Charley De La Nux.)

sulted me about it, and I told her to go see an attorney about it.

Q. Do you know if she did?

A. She did consult an attorney then; I don't know whether she kept it up; I didn't remain around the house very long. She went to Thayer's office, about the matter, and Thayer told her to come back again; she went on another "bat" and I suppose they let it go; I finally brought it up again.

Q. That is just hearsay—you know that of your own knowledge?

A. I know that she went to Thayer, the only proof I have of it is the deed; she went to Mrs. Richards.

Q. How long was that before he went to—came to me?

Mr. ANDREWS.—I object to this as not redirect.

The COURT.—Objection overruled. It is not redirect, but the Court will permit it. [184]

Q. How long was it before she came to you?

A. How long was it before she came to me?

Q. Yes, how long was this visit to Thayer—no, how long was this abstract of the deed made by Joe Clark before she came to you, do you remember?

A. 1910; I can't remember, I suppose, until three years ago, must be 1916, I suppose.

Mr. ANDREWS.—That is all.

Testimony of Mrs. Charles A. De La Nux, for Petitioner.

Direct examination of Mrs. CHARLES A. DE LA NUX, called for petitioner, and sworn, testified as follows:

By Mr. LARNACH.—Your name, please?

A. Mrs. Charles A. De La Nux.

Q. And you are the wife of Mr. De La Nux, who has just preceded you on the stand? A. Yes.

Q. How long have you been married?

A. Four years.

Q. Lived with him right here in Honolulu?

A. In Castner.

Q. Do you know Mrs. Houghtailing, who is the complainant in this suit? A. Yes, I do.

Q. Do you know Mr. George De La Nux who sits here with his counsel, Mr. Andrews?

A. I met him twice.

Q. When did you first meet him? [185]

A. At Mr. Breckons,—Mr. Larnach and my mother-in-law and Mrs. Richards went to his residence, the day we went there.

Q. Whose place, where? A. Aiea.

Q. For what visit was this—for what purpose was this visit made?

A. It was to consult over the deed.

Q. And do you remember who was in the party?

A. Yes, I do.

Q. Who were they, in the party, please?

A. Mr. Breckons, Mr. Larnach, Mrs. Henry Richards my mother-in-law and myself.

(Testimony of Mrs. Charles A. De La Nux.)

Q. We started from Honolulu in an automobile and went to Aiea?

A. Well, we started from my mother-in-law's home.

Q. When we arrived at Aiea, where did we go?

A. All went to the sitting-room.

Q. In whose house? A. George De La Nux.

Q. Who met us there, if anyone? A. His wife.

Q. Mrs. Lahapa De La Nux? A. Yes.

Q. Was she friendly?

A. Well, yes, she did; she was, yes.

Q. What style of greeting, if any, took place?

A. Kissed one another, and after awhile Mrs. George De La Nux brought out some gin.

Q. Now where was George during this time?

A. Well, I believe he was at work then, it was afterwards he ran home.

Q. And did George De La Nux appear while the party you have [186] mentioned was at his house?

A. Yes, he did.

Q. Do you know how many times liquor was indulged in there, if at all?

A. Well, I remember when we first got there, Mrs. George De La Nux brought out some gin, after we left we all took another drink.

Q. What do you mean, after we left?

A. After everything was over.

Q. Now what took place down there, when do you mean, after everything was over?

A. Well, you and Mr. Breckons spoke to Mr. George concerning the deed.

(Testimony of Mrs. Charles A. De La Nux.)

Q. Yes, do you remember what was said; if so, please tell us?

A. Well, just the very words you used I don't remember, but you spoke to him that the deed that was made that my mother-in-law only intended thr Kalihi homestead.

Q. Did Mrs. Houghtailing say anything to George?

A. She did.

Q. What did she say?

A. She said, "Sonny, you know I was jigging."

Q. Did Mr. George answer that?

A. He did.

Q. What did he say?

A. "It is up to you mother, Mama, just what you say I will agree to."

Q. Was the party friendly at that time?

A. Yes, that is, what do you mean, before this?

Q. Yes, say when that business was ended and parting was had, was there a friendliness exhibited or ill-feeling?

A. Friendly, you could see everything was agreed. [187]

Q. What do you mean by that?

A. Well, he said that, "Just what you say mother agrees me."

Q. Was there any kissing and wailing on the part of anyone? A. Yes.

Q. Who? A. My mother-in-law.

The COURT.—Any crying?

A. My mother-in-law did.

Q. Anybody join in?

(Testimony of Mrs. Charles A. De La Nux.)

A. Well, there were tears.

Mr. LARNACH.—Tears and gin were mixed, were they not? A. Yes.

Q. Do you remember when that was Mrs. De La Nux? A. That was in the year 1916.

Q. Do you remember anything being said about a paper, Mrs. De La Nux? A. Yes, I do.

Q. What was said about the paper?

A. Well, it was in the year 1916 that I heard—overheard Mrs. Richards and my mother-in-law talking.

Q. Was there anything said by anyone during that conversation about any paper?

A. Yes, you spoke to George about the deed, and he promised to come down the following day.

Mr. LARNACH.—Take the witness.

Cross-examination.

By Mr. ANDREWS.—Are you the young lady that testified in the Parke case? A. Yes.

Q. You testified you were a servant for Mr. Parke?

A. Yes. [188]

Q. Manuel Richards is a relation of yours?

A. He is an uncle of mine.

Q. You know that he testified that your truth and veracity were very bad?

A. He has got to prove that, that has nothing to do with this case.

Mr. LARNACH.—We object to that—

The COURT.—Objection sustained.

Mr. ANDREWS.—Mrs. Parke lost that case, didn't she? A. Yes.

(Testimony of Mrs. Charles A. De La Nux.)

The COURT.—What took place in that case can't affect this case.

Mr. LARNACH.—Mr. Andrews agrees that the valuation of the property, the homestead of Mrs. Houghtailing's, in 1905 and 1904, was fifteen hundred ($1,500) dollars for the land and thirty-five hundred ($3,500.00) for the improvements.

The COURT.—Five thousand dollars?

A. Five thousand dollars. That was handed to me personally by the tax office.

The COURT.—That is the tax office value?

Mr. LARNACH.—Yes, the tax office value.

The COURT.—How big is that property—where is that property?

Mr. LARNACH.—Kamehameha Fourth road, comprises two houses that were originally placed on the market by Bruce-Waring.

The COURT.—Mrs. Cockett, where is this property belonging to Mrs. Houghtailing?

Mrs. COCKETT.—Directly opposite the Catholic church on the Kamehameha IV Road, near Wong Young's place. Wong Young's place is a little below Aiau.

The COURT.—What is the area? [189]

Mr. WITHINGTON.—It is a little less than half an acre. Mr. Andrews has kindly consented that we may put it in.

The COURT.—What is the frontage?

A. Two hundred and four (204) feet.

Mr. WITHINGTON.—Mr. Andrews has kindly consented that we may recall Mr. Lawrence Robin-

(Testimony of Mrs. Charles A. De La Nux.)

son at any time; we neglected to ask him something in regard to whether this amount which Mr. Steere testified to they claimed; whether there was a deed existing in 1905; we haven't been able to locate him this morning.

With the exception of those two things, we rest.

Petitioner rests.

RESPONDENTS' CASE.

Testimony of George Anson Richards, for Respondents.

Direct examination of Mr. GEORGE ANSON RICHARDS, called for respondents, sworn, testified as follows:

Mr. ANDREWS.—What is your name?

A. George A. Richards.

Q. Where do you live Mr. Richards? A. Kauai.

Q. Do you know Mrs. Rebecca Houghtailing, the lady sitting here? A. Yes.

Q. In 1916 did you visit her at her home in Kalihi?

A. Yes.

Q. *H*ow will you just tell us what occurred, whether [190] was any trouble between herself and Henry, any conversation occur between you after that, any conversation occur between you and her after that?

Mr. WITHINGTON.—This for the purpose of contradicting?

Mr. ANDREWS.—Yes.

Mr. WITHINGTON.—I submit there hasn't been any compliance with the rule in this case, time and place, no foundation laid.

(Testimony of George Anson Richards.)

The COURT.—I remember some questions along this line.

(Reporter reads testimony on page 111:)

"Q. Do you know George Richards?

"A. No.

"Q. Do you know George Richardson?

"A. I don't remember anyway, maybe I do, know him by sight.

"Do you remember any persons, any third person, of your having a fight, having a row with Henry in 1916; and you told this man that Henry was fighting you because you had given all your property to George because the other children didn't treat you right, that Henry was robbing you."

"A. No, I don't remember.

"Q. Do you remember this man, this Mr. Richardson or Richards, while you were living at Aiea you invited him down there to come and see you, you don't remember that at all"?

"A. No, I do not."

The COURT.—It seems, Mr. Andrews called the attention of the witness to the time and place, and she didn't quite remember the particular person by name, she might have known him. I will permit you to cross-examine Mrs. Houghtailing, on that proposition, and she may remember this man by sight. [191]

Testimony of Rebecca Houghtailing, for Respondents.

Mrs. REBECCA HOUGHTAILING, recalled to the stand for further examination.

By Mr. ANDREWS.—Now, Mrs. Houghtailing, you remember I asked you if you knew George Richards or Richardson?

A. I do.

Q. I mean this gentleman? A. I know him now.

Q. Do you remember in 1916, which I asked you before, at your house, he being there?

A. He was at my house.

Q. He was living with you for awhile?

A. No, came over for a visit.

Q. Did he stay more than a night—how long did he stay? A. About, that evening.

Q. Then went away? A. Yes, sure.

Q. Do you remember a row with Henry?

A. I do not, because while he was staying there we were drinking, that is, I did, had been, and he came there to drink, he is fond of it himself.

Q. Did he ask you what the trouble was?

A. That I don't remember, Mr. Andrews.

Q. And you replied that because you had given all your property to George, because your other children hadn't treated you right?

A. I told you another time I didn't remember, because when he came there we came for *for* enjoyment, didn't come there for talking anything, about anything at all, only pleasure, drinks, and so forth, that is all.

(Testimony of Mrs. Rebecca Houghtailing.)

The COURT.—Did you have any quarrel that night when he was there? [192]

A. That I can't remember, because I was under the influence of liquor, sure.

Q. Sure you were under the influence of liquor?

A. Sure, I am sure of being under the influence of liquor.

Q. You remember being—his being there?

A. Of course he came there when I wasn't exactly drunk, that is, whatever they call it.

Q. You remember two days after that Mr. Richards going down to Aiea?

A. Yes, I remember, I took him to see my son.

Q. You asked him to come down and wanted to introduce him to your son George? A. Yes.

Q. During that conversation did you tell him that you had given George all your property because the other children had never treated you right?

A. Oh, that thing wasn't bothering my brain then, wasn't in my brain.

Q. When you were down at Aiea were you drinking there when you were talking to him?

A. I was feeling good on the car or machine, and had some on the machine with us.

The COURT.—Had some what?

WITNESS—Some gin.

Mr. ANDREWS.—Did you say that or didn't you? (Referring to previous question.)

A. No.

Q. You didn't say that?

A. I didn't say that, at least I don't remember

(Testimony of Mrs. Rebecca Houghtailing.)

saying that, that idea I didn't—that thing wasn't coming into my brain, it was only enjoyment. [193]

Q. Are you sure you were drinking at both these times? A. More or less.

Q. Well, were you so drunk you can't remember what happened?

A. My goodness, you mean to say because I was drinking I don't remember, even now without any drink I forget sometimes.

Q. You are pretty smart for a lady sixty-three years old? A. How is that?

Q. You are pretty clever, Mrs. Houghtailing?

A. Oh, dear me.

Q. Just listen to me: do you mean to say you were so drunk on those two occasions you don't know what you said, is that what you mean?

A. You know when a person is under the influence they will say anything without being so drunk and then pass away and forget it.

Q. Well, you were so much under the influence you didn't, don't remember what you said?

A. I don't remember, sure.

Mr. ANDREWS.—That is all.

The COURT.—What do you claim she said at the Kalihi home on Kamehameha IV Road?

Mr. ANDREWS.—The testimony will be, it is the second time; my understanding of the testimony is this; that she was having a fight with Henry, and the old gentleman asked her what was the trouble, something to the effect that Henry was fighting with her because she had given all her property to George

(Testimony of Mrs. Rebecca Houghtailing.)
and the other children didn't treat her right, that is why she had given it; then she invited him the next day to come down and meet George, George was a fine boy, and she was proud of him; then practically repeated that conversation in the car going down. Mr. Richards will testify that she was apparently all right. [194]

The COURT.—(To witness.) Did you have any conversation like this on the car or machine?

A. It was on the automobile.

Q. Did you have any conversation like that?

A. No. It seems so funny; it seems every time it comes out I am always or there is a party coming in and I am having a row with my son, just like this, another one comes in, I am having a row with my son, my son is having a row with me about the property, I am having a row over this property, each person comes in and tells that.

The COURT.—Did you have a row with your son at the time George Richards was at your house?

A. I did not.

Q. You did not or you don't remember?

A. I don't remember, that is why I say I don't know.

Mr. WITHINGTON.—Who were in the car going out?

A. I think there was another gentleman by the name of, I don't know his name now, maybe he remember who this is.

Q. Who provided the car? A. I did.

Q. Then you were going out to George's?

(Testimony of George Richards.)

A. Yes, going down to Maunalua, anywheres, I am willing to take them around.

Testimony of George Richards, for Respondents.

GEORGE RICHARDS, recalled.

By Mr. ANDREWS.—Mr. Richards, you have just heard Mrs. Houghtailing, and my questions to Mrs. Houghtailing, did you not?

A. Yes.

Q. Now were you at her house some time in 1916 at her [195] invitation when there was trouble between herself and Henry?

A. Henry he told me he didn't like the mother because she gave the property, willed the property all away to George.

Mr. WITHINGTON.—I move to strike it all out as not responsive.

Mr. ANDREWS—You were there?

A. Yes, I was there.

Q. Now tell us please, let the other be stricken out—now will you please tell us then what happened when you were there, tell us over again, Henry said what to you?

The COURT.—Motion to strike granted.

WITNESS.—Told me he didn't like the way she acted because she willed all her property away to her son, she ought to will it to all of them.

Q. What did she say to you, and did you say anything to her? A. Yes.

Q. What did you say to her?

A. After I said, "Is that right?" And she said,

(Testimony of George Richards.)

"Yes, she willed the property to George."

Q. After that—Oh, was she drunk at that time?

A. Oh, pretty loaded.

Q. Did she know what she was doing and saying?

A. Oh, yes.

Q. She was in her right senses? A. Yes.

Q. Now then after that did you go anywhere with her?

A. Yes, we came down to the moving picture in town here that night.

Q. And after that did you go anywhere?

A. Two days after that.

Q. Where did you go with her? A. At Aiea. [196]

Q. At whose request? A. Hers.

Q. Now what did she tell you?

A. Told me to come down there to see her son George.

Q. Son who? A. George.

Q. Did she say anything about George to you?

A. No.

Q. Did she say anything while she was either on the way down there or about her property or George or anything?

A. Well, down to George's house she said she willed all her property to George, willed her property to George.

Q. Was that in George's house?

A. That was in George's house, yes.

Q. And who was present when she told you that she had *will* all her property to George?

(Testimony of George Richards.)

A. Me and George and his wife and Mrs. Kaae and Makanai.

Q. Will you tell us just what you remember Mrs. Houghtailing said?

A. She said she willed her property to George, that is all I heard.

Q. Did she say anything about her boys or any reason why she did it? A. Yes.

Q. What did she say?

A. Because of the other boys.

Q. Did she give any reason? A. She says—

Mr. WITHINGTON.—I object to that, what was said is the question; you asked—

The COURT.—What was said—

Mr. ANDREWS.—All right, what was said? [197]

A. The other boys didn't treat her well, or right.

Q. Did she say how they didn't treat her right?

A. No.

The COURT.—She said that she had willed the property to George, is that it, all the property to George?

A. All the property? I don't know, I didn't take much notice.

Q. What do you remember she said?

A. She said she will her property.

Q. "Her property"? A. Her property.

Q. To George? A. To George.

Q. Did she say she willed her property to George and his wife? A. No, to George.

Q. Just George? A. Yes.

Mr. ANDREWS.—That is all.

Mr. LARNACH.—That is all.

Testimony of Mrs. Kaae Haeho, for Respondents.

Direct examination of Mrs. KAAE HAEHO, called for respondents, sworn, testified as follows:

Mr. ANDREWS.—What is your name, please?

A. Mrs. Kaae Haeho.

Q. You were Mrs. Jesse Kaae?

A. Yes, he is dead.

Q. And Mr. Haeho, he is dead too? A. Yes.

Q. Do you remember Mrs. Houghtailing? [198]

A. Yes.

Q. How long have you know her?

A. That same day we went down with Mr. Richards.

Q. Didn't you know her before that?

A. Mrs. Houghtailing, oh, I know her when she was a girl.

Q. You have known her when a small girl until now? A. Yes.

Q. Did you have any talk with her at her house about the question of her deeding her property?

A. It was she brought the subject up.

Q. When was that? A. That was in 1915.

Q. Now will you please tell us just what happened? Tell the Court.

A. We were all alone that day at her house.

Mr. WITHINGTON.—I don't remember any conversation laid for this in 1915.

Mr. ANDREWS.—If the Court please there was, this statement, showing that she did know that she deeded the property and her reasons for it.

(Testimony of Mrs. Kaae Haeho.)

The COURT.—Have you laid the proper foundation?

Mr. ANDREWS.—This is not impeaching, if the Court please. This is proof that she knew that she had deeded this property to her son George, she has denied that over and over again. Not that she had made one statement at one time and another statement at another time, it is contradicting the fact that she testified to, it is a material fact.

The COURT.—She testified now that she didn't know about making—about that deed, that she conveyed all her property; you examined her upon that point. Now you are putting on testimony to show that she made statements contrary to the [199] statements she is making now, that she did know. If the Court believes the testimony of the present witness the Court can use that for the purpose of determining the question that she did know; still you have to lay the foundation.

Mr. ANDREWS.—If the Court please, of course it is very hard for us, this testimony just came to me yesterday.

Mr. WITHINGTON.—We do not object to her being recalled if counsel do not connect up the testimony.

The COURT.—You ought to recall her for the purpose of laying the foundation.

Mr. ANDREWS.—I will recall Mrs. Kaae for the time being and put her on to-morrow.

Testimony of Mrs. Edward Charles Henry, for Respondents.

Direct examination of Mrs. EDWARD CHARLES HENRY, called for respondents, sworn, testified as follows:

Mr. ANDREWS.—What is your name?

A. Mrs. Edward Charles Henry.

Q. Where do you live Mrs. Henry?

A. 1030 Kamali Street.

Q. Do you know Mrs. Houghtailing. A. Yes.

Q. In March, 1917, did you go to her live at her house? A. Yes.

Q. Where was that house you went to live?

A. Kamehameha IV Road.

Q. At that time was she living there or was she living somewhere else?

A. She was living at that time at her son George's. [200]

Q. At Aiea? A. Yes.

Q. After she came back from there did you continue to live at her house? A. Yes.

Q. Now after she came home did you and she have any conversation as to her property, and her son George? A. Yes.

Q. Tell us what she said to you?

A. She said that she had made a deed to her son George, and then she, now she come to realize that she was sorry that she did, and she wanted a deed for the other two boys that she had.

Q. And was she intoxicated at the time she made that statement to you? A. No.

(Testimony of Mrs. Edward Charles Henry.)

Q. How long did you live at the house?

A. Between eight and seven months.

Q. During that time was—have you heard the testimony of the witnesses, that Mrs. Houghtailing was drinking all the time—witnesses on the other side, as to her being drunk, what will you say during those six or seven months you lived at her house?

A. She wasn't drinking all the time.

Q. Well, what was her condition? Just tell the Judge.

A. She was in her right senses and always been until the case start in here, and she started to drink again.

The COURT.—Did she quit drinking in 1910?

A. Yes, for three or four months.

Q. That is when she got sick?

A. When she got sick she didn't drink that time.

Mr. ANDREWS.—Now, did you hear any quarrel between her and Henry? [201]

A. When they are drunk, yes, they have some quarrel.

Q. What was said if anything about this property when they were quarreling?

A. Well, Henry was asking the mother, "What made you give the land and property to George?"

Q. Yes.

A. She told him, that you boys were mean to me, that is what made me make a deed over to George.

Q. Now, at that time when she was quarrelling with Henry was she in her right senses—telling that to Henry?

(Testimony of Mrs. Edward Charles Henry.)

A. Well, they were, they had a little drink, of course.

Q. Did she seem to know what she was saying?

A. Yes.

Q. Now, then, did she ever deny in your presence or say to you that she had denied ever giving her property to George?

Mr. WITHINGTON.—I object to that; I don't remember anything of that kind.

The COURT.—She wasn't charged with the duty of denying it to this witness.

Objection sustained.

Mr. ANDREWS.—Now, do you remember the occasion of Mrs. Houghtailing getting sick?

A. Yes.

Q. Was she very sick, or just a little sick?

A. Yes. She was very sick.

Q. Did she say anything to you about this matter, what did she say to you if anything?

A. To go and call for George.

Q. Did she say what she wanted him to do—tell you what she wanted him to do?

A. She wanted to have a talk with him over the deed she made. [202]

Q. What did she want done if anything?

A. She wanted to have it all made out again and made out to him.

Q. Instead of to whom?

A. Instead of the other two boys.

Q. What other two boys?

A. Henry and Charles.

(Testimony of Mrs. Edward Charles Henry.)

Q. Now, let me see, when did this happen; when was this that she was sick?

A. The same year, 1917.

Q. Had she made it out to the other two boys?

A. What is that?

Q. Tell us what she said, as near as you can remember, you say she sent for George; what did she say?

A. George didn't come up at the time, and couldn't get him by telephone.

Q. What did she tell you that she wanted to see George for?

A. Just to straighten out things, that is all I know, over the deed she made.

The COURT.—Tell us what she said.

WITNESS.—That is all.

Q. What was it?

A. She said she wanted to straighten out the deed with George, that he will have all, it is up to him to divide up among the other two boys.

Q. Did she say anything about having given it to George's two children, do you remember?

A. No, I don't remember that.

Q. You don't remember? A. No.

Q. You don't remember whether she wanted to change from the two children to George? [203]

Mr. WITHINGTON.—I submit, I object—

WITNESS.—No.

Objection sustained.

Mr. ANDREWS.—That is all.

Mr. WITHINGTON.—That is all.

Testimony of Mrs. Lucy Kauhane, for Respondents.

Direct examination of Mrs. LUCY KAUHANE, called for respondents, sworn, testified as follows:

Mr. ANDREWS.—What is your name?

A. Mrs. Lucy Kauhane.

Q. In 1899 where were you living?

A. In Hawaii (Kauai).

Q. Did you know George De La Nux at that time?

A. Yes.

Q. Where was he living? A. Kauai (Hawaii).

Q. Well, what part of Kauai (Hawaii)?

A. Hamakua, Paauhau plantation.

Q. With whom was he living, was he married then?

A. With Lahapa, Mrs. De La Nux now.

Q. They were living there and he was working on the plantation? A. Yes.

Q. Where were you living?

A. At Hamakua, Honokaa.

Q. With them or near them or what?

A. Near them.

Q. Do you know Mrs. Houghtailing?

A. Yes. [204]

Q. Do you remember her coming up there?

A. Yes.

Q. Now, did you hear any conversation, or do you know of any conversation, you know of your own knowledge of any conversation Mrs. Houghtailing had with George? A. Yes.

Q. What was said, what did she want?

A. Urged George to come to Honolulu and quit working, and George said he was brought up to work,

(Testimony of Mrs. Lucy Kauhane.)

he couldn't go without working; well, she says, "I want you to come, son; you are the favorite son, and you have been away so long, so you must come along; you need not work, mother has money to provide for us"; so George says, if he should come he must work; could not go without work, because he was brought up to work.

Q. Did he come at that time?

A. He did not. I came here to school before he did.

Q. At the *the* time that Mrs. Houghtailing said these things to him *what* she sober or intoxicated?

A. Sober.

Q. Now then, when did you come to Honolulu?

A. 1899.

Q. What was your reason for coming to Honolulu?

A. To attend Normal School.

Q. Did you use to go to Mrs. Houghtailing's house down here? A. Yes.

The COURT.—When was that conversation, in 1905? A. 1899.

The COURT.—And you came to Honolulu in 1899?

A. Yes, before the opening of school; this was during the [205] summer the conversation was held.

Mr. ANDREWS.—Now do you remember a conversation between Mrs. Houghtailing and George De La Nux after you came to Honolulu in her house about her property?

A. Well, it is after I got married and lived at Aiea.

Q. How long—what year was that, about, do you know? A. I cannot exactly remember the year.

(Testimony of Mrs. Lucy Kauhane.)

Q. A good many years ago? A. Yes.

Q. Was it before 1905 or after do you know?

A. I think it was after 1905.

Q. You don't know? A. I can't remember that.

Q. What was the conversation anyhow?

A. Well, the conversation then, she wanted her property fixed—

Mr. WITHINGTON.—Now, I think, this is absolutely new to me.

Mr. ANDREWS.—When did you go to Aiea?

A. About 1902 I think, my husband had work on the plantation.

Q. How long after you got to Aiea was this conversation can you tell us?

The COURT.—The conversation between—

Mr. ANDREWS.—Overheard between Mrs. Houghtailing and George De La Nux.

WITNESS.—During the time my husband was—during the time I was living at Aiea my husband worked at the plantation, but I can't remember exactly what year it was, it is so long ago, way back, I didn't think anything would happen.

The COURT.—I think it is sufficiently close.

Q. Can you, will you, tell us where this, where was this conversation that you heard?

A. In George's house.

Q. Who was there? [206]

A. George De La Nux, myself and Mrs. Houghtailing, and Mrs. Lahapa De La Nux.

Q. Now what—tell us all you remember of that conversation?

(Testimony of Mrs. Lucy Kauhane.)

A. She told George that she wanted to have things straightened up about her property, I don't know how much property she has, but she said her property, because George had a son then, then she told George, he wanted to have the thing fixed onto his son—to George and his son, so George expected another child, so that George told her to wait until the second child was born, so after the second child was born then she asked again to have the thing straightened up, so George said, "Go along."

The COURT.—That is another conversation?

A. At the same time she said she wanted George to have the things fixed up, because George had only one child and he expected another one he preferred to have it left until the other child was born because—

Q. Was anything said about George's other brothers by anyone?

A. Because they were abusing her, didn't treat her as a mother.

Q. How did that come up, that question about their—about the other sons abusing her?

A. I don't know how, she brought it up herself, I don't know how.

Q. When she spoke to George about, this, let me refresh your memory, didn't George sa*id*, "I want to leave—there are three of us, I want you to leave it to all of us."

A. He did say that, he said he didn't want it all, but she said, "No," they don't treat her as a mother.

Q. Now how long did you live at Aiea? Have you

(Testimony of Mrs. Lucy Kauhane.)

lived there long? A. No, I am living in town. [207]

Q. How long did you and your husband live down there?

A. For one year and *the* he quit, then we moved and came to town, about two years in town, went back again to the plantation to the pump, Waimalo pump.

Q. How long have you work—how long did you stay down there? A. About two years I think.

Q. Two more years?

A. Then we moved back again in town.

Q. Did you use to go down to Aiea and live at George's house? A. Yes.

Q. How long would you stay at a time?

A. A week sometimes.

Q. And you remember Mrs. Houghtailing coming there to the house while you were staying at George's house? A. Yes.

Q. What would be the conversation, what would she want down there? A. About her property.

Q. About her property, tell us and the Court?

A. Tell about her property, to have it fixed, straightened up, get it done with, have the matter fixed, and George would put it off to go to work, he had plenty to do, wait until later on, about the brothers, she would urge him to—

Mr. WITHINGTON.—Do you claim this under your cross-examination?

Mr. ANDREWS.—Yes.

Q. Now, what was her condition at this time, was she sober or intoxicated?

(Testimony of Mrs. Lucy Kauhane.)

A. Sober all that time when I heard her talking, she came to Aiea she was sober, not drunk.

Q. All these occasions as far as you remember—Now in 1917, you remember Mrs. Houghtailing coming to Aiea? A. Yes. [208]

Q. And stopped at George's house? A. Yes.

Q. Do you remember her making any statment to George about himself and the property at that time,—you remember this—do you remember any conversation which—when she came down to live in 1917 at George's house at Aiea, did she make any statement to him about the property now that you remember, were you down there then?

A. Yes, I was down there for awhile, I didn't stay there very long.

Q. Let me refresh your memory?

The COURT.—1917?

Mr. ANDREWS.—Yes. Were you down there?

A. Yes, 1917 and 1918, I am there nearly all the time, off and on, the De La Nux place, that is the only place I go to.

Q. Were you down there in 1917 when the mother was there?

A. I was there quite a number of times when she was down there too.

Q. Did you hear any conversation between them?

A. Yes, I hear them talk.

Q. What did they talk about?

A. Talked about this property, was glad she had given it to George and his children, all like that.

Q. George De La Nux?

(Testimony of Mrs. Lucy Kauhane.)

A. George De La Nux and his children.

The COURT.—At the time they talked, way back in 1902 and 1903, when they only had one child, did the mother say she wanted to give the property to George himself or the child?

A. To George and the child, but George was expecting another one soon to come.

Q. And George said to wait until the other one arrived? [209]

A. Yes, wait until the other one arrived, after the second child arrives, and she kept on asking him to get, to come on son, don't neglect it, don't let it go too long.

Q. What did George say?

A. He said, he had two brothers, he didn't want to grab it all, she had two sons, and she said they were not, never mind, "they aren't treating me very well."

Q. Did *she anything* about the other grandchild, Bathsheba?

A. Didn't hear her say anything about them, only about brother George's children.

Q. Did George say anything about the grandchild?

A. No, he always spoke of his brothers, he wanted them—he didn't want it all, because he had two brothers besides.

That is all.

Cross-examination.

By Mr. LARNACH.—You say that Mrs. Houghtailing wanted Mr. George De La Nux to come to town so as to fix up this transfer of the property?

A. Yes.

(Testimony of Mrs. Lucy Kauhane.)

Q. Did she tell George why it was necessary for George to come into town to have this fixed?

A. She wanted it fixed, and she didn't want this quarreling, and besides she *didn't the* other two to have it.

Q. She wanted George to have it fixed?

A. To attend to fixing the papers.

Q. Not anybody else?

The COURT.—Did George come to town and have the papers fixed?

A. Later on, not when she asked him, the other time she asked him.

Q. Do you know whether or not he did come down and fix them? [210]

A. She asked him very badly, he had to come to fulfill—

Q. Do you know whether or not he did come?

A. He did come along with his mother, not by himself, the time that he had this thing fixed he came along with his mother and stopped at my house?

Q. Stopped where?

A. At my house, they all stopped at my house to have these things fixed, I didn't know that they were going to have this thing fixed, I heard of it long afterwards, that he had come to town to have it fixed.

Q. Who do you mean, they all stopped at my house, Mrs. Lahapa De La Nux and Mrs. Houghtailing?

A. Yes, Mrs. Lahapa stopped at my house, and George and his mother come to my house.

The COURT.—Did George ever tell you that he fixed it up?

(Testimony of Mrs. Lucy Kauhane.)

A. No, he never told me anything about it.

Mr. LARNACH.—Do you know when Mrs. Houghtailing made the statement that you said she made to you in 1917 about George and the property, that Mrs. Houghtailing had already a guardian appointed and that there was a suit pending against George—in 1917?

A. I don't understand?

The COURT.—In 1917, did George De La Nux or anybody tell you that his mother was—had a guardian appointed for her, or someone appointed guardian for her?

A. I never heard George tell me, that I don't know anything, about it.

Q. Did anybody tell you?

A. I don't know if she has a guardian to-day or not.

Q. Did she tell you that Mrs. Houghtailing, that a guardian had been appointed for her? [211]

A. I haven't heard that, I don't know whether she has any guardian to-day or not.

Mr. LARNACH.—Did you know anything in 1917 about a suit that was brought by Mrs. Houghtailing against George?

A. That is once they came for me to appear in Mr. Andrew's office.

Q. When was that?

A. In 1917, I don't know the date.

Q. They brought a suit in 1917? A. Yes.

Q. Was that before or after you heard this statement made by Mrs. Houghtailing?

(Testimony of Mrs. Lucy Kauhane.)

A. They had—suit had already been begun.

Q. You heard this statement made by Mrs. Houghtailing after the suit was begun?

Mr. ANDREWS.—Never said anything of the kind.

Mr. LARNACH.—I am asking her, I have the same privilege of asking her, with the permission of the Court.

Mr. ANDREWS.—We object—

The COURT.—Heard what statement?

Mr. LARNACH.—The statement of Mrs. Houghtailing about her property here, giving it to her son George.

Objection overruled.

WITNESS.—I don't understand that.

The COURT.—Did Mrs. Houghtailing tell you in 1917 that she was glad she gave the property over to George?

A. Yes, she did say that.

Q. Did you hear that after you found out suit had been begun?

A. After the suit was begun I never had any conversation with Mrs. Houghtailing at all.

Q. When was the suit begun? [212]

A. I don't know when the suit was begun, but I know they had sent for me in 1917; I know what month it was, I remember what month and the date they sent for me, I had to appear in Andrew's office.

Q. Was that after she had told you or before she told you?

(Testimony of Mrs. Lucy Kauhane.)

A. That was after she had told me that she was glad George was to—

Q. That was first? A. Yes.

Q. Then heard about it afterwards?

A. Heard about the suit afterwards.

Q. Who asked you to go down to Mr. Andrew's office? A. They sent a note.

Q. Who?

A. I don't know the name of the lawyer, I can't remember, it is so long ago, I didn't think the thing would be so—

Q. Mrs. Houghtailing?

A. No, it was a writing to come to appear in Mr. Andrew's office as a witness, I have forgotten.

Q. Did you use to go to Mrs. Houghtailing's house?

A. When I was attending school I used to go there.

Q. Do—did you know Bathsehba? A. I did not.

Q. Henry's daughter?

A. I seen her when she was a baby, I knew her when she was a baby, not when she came to be a woman.

Mr. LARNACH.—Did you notice her there at Mrs. Houghtailing's house during the years 1908, 9, 10, 11, 12, on? A. 1912 on I never go there.

Q. When did you visit Mrs. Houghtailing?

A. When I was attending school. [213]

Q. When was that? A. 1899 on to 1901.

Q. After 1901 you ceased visiting.

A. Ceased visiting, often meet her at George's place, that is where I used to meet her.

Q. You used to visit George's place quite fre-

(Testimony of Mrs. Lucy Kauhane.)

quently, didn't you? A. Yes.

Q. You are quite a friend of George and his wife Lahapa? A. First cousins.

The COURT.—You and Lahapa are first cousins?

A. Yes.

Mr. LARNACH.—When you met Mrs. Houghtailing at George's place at any time were any of Mrs. Houghtailing's grandchildren mentioned?

A. When she was there I remember saying, when I am there too, she always mentioned about George's oldest child.

The COURT.—George's oldest son?

A. Yes.

Q. Anybody else, any other grandchild?

A. Never mentioned anybody else.

Mr. LARNACH.—Never mentioned Kulamanu or Bathsheba?

A. No.

Q. Never mentioned any of Henry's children?

A. Never heard her mention any of Henry's children, all I hear her talking about is George's oldest child, oldest son, never even mentioned about the youngest, but always about the oldest one.

That is all.

That is all.

The COURT.—This case will be continued until to-morrow morning at nine o'clock. [214]

Thursday, June 19, 1919, 9 o'clock A. M.

Testimony of Judge Wm. L. Whitney, for Respondents.

Direct examination of Judge WM. L. WHITNEY, called for respondents, sworn, testified as follows:

By Mr. ANDREWS.—Judge Whitney, you are a practicing attorney of this court?

A. I am.

Q. In the year 1917 you were Second Judge of this Circuit Court here? A. I was a part of the time.

Q. On the 14th of February, 1917? A. I was.

Q. Do you know Rebecca Houghtailing?

A. I do.

Q. Do you remember—handing you exhibit—Defendant's Exhibit No. 2, do you remember drawing up that paper and having her execute it before you?

A. I do.

Q. Where did that take place, Judge?

A. In my chambers in the Mauka-Ewa corner of this building.

Q. Now, before she had come to you—before that was executed that deed had Mrs. Houghtailing come to see you about anything? A. She has.

Q. How many times?

A. Two or three times, I should think, three times prior to this.

Q. Had you seen George De La Nux who is mentioned in there, [215] have you ever seen him before this time, before the execution of this deed?

A. I had seen him a great many times, never to talk to him.

(Testimony of Judge Wm. L. Whitney.)

Q. Had you any business with him?

A. I had not.

Q. Had he consulted you about this power of attorney? A. He had not.

Q. On the occasion of the drawing of this power of attorney will you kindly relate just what happened between—who was present, first, just what happened before it was signed.

Mr. WITHINGTON.—How is that material?

Mr. ANDREWS.—She said that George brought her to Judge Whitney; he was the one that wanted the power of attorney; it was his suggestion and they both did the talking.

Mr. WITHINGTON.—Nothing that contradicts her testimony, doesn't say that particular son George was with her at Judge Whitney's office.

The COURT.—What is the objection?

Mr. WITHINGTON.—How is it material; what do you expect to show?

Mr. ANDREWS.—We expect to show that she went to—mind you, this is the time that she was saying that she was suing us, didn't want the property back, and all that; we want to show that she went to Judge Whitney's and asked to have Steere removed and her son placed in his place, made arrangements for this, and asked Judge Whitney, that Judge Whitney suggested a power of attorney, and at her suggestion agreement was drawn up, that George had nothing to do with it except to sit there.

Objection overruled.

(Testimony of Judge Wm. L. Whitney.)

Mr. WITHINGTON.—Withdraw objection to the question.

WITNESS.—Mr. George De La Nux, Mrs. Houghtailing and myself [216] were the only persons present, except at the time that I called in the clerk and told him to put on the seal.

Q. Judge, what conversation took place between yourself or George De La Nux and yourself or Mrs. Houghtailing and yourself, either at this time or before this time, in regard to this power of attorney, which resulted in the drawing of this power of attorney?

A. I had a second or third visit to me, Mrs. Houghtailing told—had told me that she was then living with her son George at Aiea, and that it was a considerable nuisance to her to come into town to see me about these matters she had been seeing me, and wanted to know if her son George couldn't handle the matter for her; I told her, certainly he could.

Q. What was the matter, may I ask?

A. This was the matter of getting money from Mr. Steere; she at first called upon me to complain about Mr. Steere, her guardian, that he was not giving her money enough to live on, that he wouldn't file an accounting; I didn't know Mr. Steere was her guardian at that time; I looked it up and found that Mr. Steere was her guardian, that his accounts were overdue, and I then wrote him a letter asking him to furnish the accounts. Mrs. Houghtailing came in again about this afterwards and asked me if I had received the accounts, and I said I had not. but that I would

(Testimony of Judge Wm. L. Whitney.)

write again, and I either wrote again or I saw Mr. Steere and had a conversation with Mr. Steere in which he told me his side of the story. Mrs. Houghtailing came again and asked me if the account had been filed, and I told her it had not at that time; she said it was a great nuisance to come in from Aica and asked if he, her son, couldn't handle the matter for her, and I told her her son could and that it would require [217] only a simple power of attorney to give her son full authority to handle the matter for her. She—I don't remember the exact words, but she acquiesced in that matter, and I told her she better have her son come in with her, which she said she would do. Perhaps two or three days thereafter Mr. George De La Nux and Mrs. Houghtailing came in together and I said to Mr. Houghtailing—or Mr. De La Nux, your mother has suggested that you handle this matter for her, and would you be willing to do so; he said he would be willing to do so; I then stepped over to the typewriter and drew this, and Mrs. Houghtailing signed it; I called in the clerk and acknowledged it, she acknowledged it before me, and I called in the clerk and had him put the seal on.

Q. She understood what it was, Judge? A. Yes.

Q. She wasn't intoxicated? A. She was not.

Mr. ANDREWS.—My remembrance is that she testified that she was stupid.

Mr. LARNACH.—She said she wasn't under the influence of liquor.

Mr. ANDREWS.—Did she show any signs of

(Testimony of Judge Wm. L. Whitney.)

being stupid from the effects of liquor or anything else?

Mr. LARNACH.—I object to it on the ground this testimony was brought out on cross-examination, words put in the witness' mouth, and that he is bound by the answer in that case.

The COURT.—What is that?

Mr. LARNACH.—Withdrawn the objection; let him testify.

WITNESS.—She showed no signs.

Q. Did she show any signs of being under the effects of liquor? [218]

A. She didn't at the time of this agreement, that this was drawn.

Q. Now, was anything said at that time or any conversation in which she wished to have Mr. Steere removed? A. Yes.

Q. Will you please tell us about that?

A. Well, she said on more than one occasion that she wanted Mr. Steere removed, and on the second or third visit she said that she wanted her son George appointed as her guardian.

That is all.

Cross-examination.

Mr. LARNACH.—Judge, did I understand that Mrs. Houghtailing requested you to draw this power of attorney entrusting all her affairs to her son George?

A. It had nothing to do with is except the collection of moneys from Mr. Steere.

(Testimony of Judge Wm. L. Whitney.)

Q. That was all she requested you to empower her son to do?

A. The suggestion came from me; she didn't request me at all.

Q. You made the suggestion?

A. I made the suggestion.

Q. Was anything said by her which informed you that there was a suit pending between herself and George De La Nux? A. There was not.

Q. Or that there had been any demand made on Mr. George De La Nux by Mrs. Houghtailing or her attorneys for a reformation of any deed?

A. There was not.

Q. You knew nothing of that?

A. I knew nothing of that.

Q. Did George inform you that his mother had independent counsel [219] hired on that occasion?

A. Did not.

Q. Then you did not know that demand had already been made on Mr. George De La Nux for and on behalf of his mother for the reformation of a certain deed? A. I did not.

Q. Did you know anything about that deed?

A. I did not.

The COURT.—When was that suit filed, Judge?

Mr. LARNACH.—April, 1917, but demand was made on Mr. George De La Nux the early part of 1916.

The COURT.—Were you handling the equity division at that time, Judge?

WITNESS.—I think I was not; I was handling

(Testimony of Judge Wm. L. Whitney.)

the probate and divorce, criminal and land court; I think Judge Ashford was handling equity at that time.

The COURT.—Judge, you say you looked up the proceedings in court had in the matter of the application for the appointment of a guardian for Mrs. Rebecca Houghtailing

A. I didn't look up the papers, merely asked the clerk the fact as to whether Mr. Steere was her guardian.

A. You don't remember—

Mr. LARNACH.—Did you or did you not, showing Judge Whitney Plaintiff's Exhibit "E," and drawing attention to the order appointing the guardian, you don't remember signing that?

A. I see it was signed by myself; I don't remember signing it, is was signed by me..

Q. You didn't look up this order *appoint* a guardian for Rebecca Houghtailing at the time you drew that power of attorney, did you, Judge?

A. No, I didn't get the papers out at all. [220]

Q. You were not aware of the fact that she was put under a guardianship because of her over-indulgence in intoxicating liquor? A. Yes.

Q. You were aware of the fact?

A. I knew that was the reason; I knew that it was a spendthrift guardianship, so-called.

That is all.

That is all.

Testimony of Lawrence Robinson, for Petitioner.

Continued direct examination of LAWRENCE ROBINSON, called for petitioner, testified as follows:

By Mr. LARNACH.—Can you say, Mr. Robinson, the sum that Rebecca Houghtailing was indebted to your office, that is, to your father, Mr. Mark P. Robinson, on or about the year 1905? A. Yes, $6,400.

Q. That was by way of overdrafts and money advanced? A. Over and above her income.

Q. Amounts that had been advanced to her, do you mean? A. Yes.

Q. By Mark P. Robinson? A. Yes.

Q. And when Mr. Steere was appointed how much money did she owe your father and your father's estate? A. Over ten thousand dollars.

That is all.

That is all. [221]

Testimony of Richard Westerbee, for Respondents.

Direct examination of Mr. RICHARD WESTERBEE, called for respondent, sworn, testified as follows:

Mr. ANDREWS.—Your name, please?

A. Richard Westerbee.

Q. What is your business, Mr. Westerbee?

A. Master painter Honolulu plantation.

Q. Have been there very long?

A. Since February 10, 1911.

Q. Do you know George De La Nux? A. I do.

(Testimony of Richard Westerbee.)

Q. Have known him ever since you have been on the plantation?

A. Know him for the last eighteen years.

Q. He is employed by—

A. The Honolulu Plantation.

Q. What is his position now?

A. Chief engineer.

Q. Do you know Mrs. Houghtailing? A. I do.

Q. Did you see her on—during the years 1911 to 1915? A. Not during the year 1911, no.

Q. When thereafter? A. 1912.

Q. From then on until when?

A. From then on until, the last time I remember, I think it was last May a year ago.

Q. Where have you seen her most of the time?

A. At Mr. George De La Nux' house.

Q. In Aiea, and Halawa?

A. Yes, I don't remember seeing her at Halawa, but at Aiea. [222]

Q. At any other times have you seen her frequently or very seldom?

A. Why, I seen her frequently when she was down there.

Q. What was, would you say, as to her condition as to sobriety, whether she was intoxicated at the times you have seen her?

A. I never saw her intoxicated in my life.

Q. What about her conversation, rational or irrational, sensible? A. Yes; sensible.

Q. Have you ever been with her any place where drink—where there was plenty of drinking?

(Testimony of Richard Westerbee.)

A. I have been at the house when there was liquor on the table; yes.

Q. Has she ever drank it?

A. Not in my presence, no.

Q. Have you ever heard of her speaking of the De La Nux children? A. Yes.

Q. In what terms?

A. Terms of endearment; seemed to like them, think a great deal of the "hoopunas," as she called them.

Q. Spoke of them both as hoopunas? A. Yes.

Q. Was anything said in your presence or to you about her relations with her other two sons?

A. No, not directly; I asked her one day where Charley was, and she just threw her hands up and didn't say anything.

Q. What did—what seemed to be her relations as far as George was concerned? What were—what seemed to be her relations with George during all the times you saw her? [223]

A. Very friendly and affectionate.

That is all.

Cross-examination.

Mr. WITHINGTON.—Now, you say you saw her frequently when she was there from 1912 to 1918?

A. 1918, May; that is the last time I saw her.

Q. When was she there?

A. Well, she was there on several occasions; I don't just remember the exact dates.

Q. Give us as near as you can some years.

A. I couldn't do that, either; the reason I met her

(Testimony of Richard Westerbee.)

there, because that was the first time I met her.

Q. Did you see her there in 1918?

A. Yes, May.

Q. She was there in May, 1918, when was the time before that you saw her there?

A. I don't remember.

Q. Well, was it one year or six years before?

A. Well, it must have been within six years; I didn't make any note of the dates or even put it down as a special occasion; I used to go to the house every day; I used to see her if she was there; if she wasn't there I wouldn't ask.

Q. I understand you to say that you saw her frequently when you were there; can you say one year before or six years before this other occasion when you saw her?

A. Oh, it was within the past three or four years; I have been up there several times, a good many times in fact, I used to go up there every night.

Q. I am not asking you whether you went there every night; when [224] was the last occasion before May, 1918, that you, that she was visiting George —you said it was within six years, I ask you whether it was one year or six years.

A. Might have been about eighteen months, I should think; I am not positive on that point, though.

Q. Now, when did you see her there before that time, if at all? A. I could not say.

That is all.

Testimony of Charles N. Arnold, for Respondents.

Direct examination of CHARLES N. ARNOLD, called for respondent, sworn, testified as follows:

By Mr. ANDREWS.—Your name is Charles N. Arnold? A. It is.

Q. What position do you hold?

A. I am in charge of the Supply Department of the Honolulu Plantation.

Q. And have been in Aiea how long on that plantation? A. Almost eighteen years.

Q. Do you know Mr. George De La Nux?

A. I do.

Q. What position does he hold?

A. Chief engineer of the Honolulu Plantation.

Q. How long has he been there?

A. Oh, he has been there about nineteen years, twenty years.

Q. And his reputation down there is—

Mr. LARNACH.—I object to that; we haven't attacked it as yet; not competent, irrelevant and immaterial. [225]

Objection sustained.

Mr. ANDREWS.—You know Mrs. Houghtailing?

A. I do.

Q. How long have you known her?

A. Oh, I should judge about twenty years.

Q. What can you say of her—oh, during that time how well have you known her, in what places? Tell us, please, just in detail.

A. Well, I have known her, knew her intimately once when she was living with her husband Mr.

(Testimony of Charles N. Arnold.)

Houghtailing on Bethel Street; after a while I met her again at Waimalo where she was visiting her son while he was pumping there, her son George; later on, first met her at Aiea when George was night sugar boiler in Aiea; then again I met her several times in Waimalo when he was pump engineer, later I met her again in Aiea when he was mill engineer.

Q. More than once at these different places?

A. Oh, yes, several times.

Q. What can you say from your acquaintance with her, knowledge of her, as to her sobriety?

A. Well, I have never seen her anything but sober, any other condition but in a sober condition.

Q. Did she seem to be—could she talk sensibly, intelligibly about matters?

A. She has always when speaking to me.

Q. That is your testimony about every time you have seen her? A. Yes.

Q. What were her relations with her son George during all these times that you have seen her at his house? A. Seemed to be very friendly.

Q. Did you notice any—did anything occur that would show [226] her relations with George's two children at the time you saw her there

A. She seemed to be very much broken up at the death of one of George's children along in May last year.

Q. Before that time did you notice anything about her relations with the children?

A. She always seemed to think a great deal of

(Testimony of Charles N. Arnold.)

them, that is all I can say about that.

That is all.

Cross-examination.

Mr. WITHINGTON.—You saw her down there a year ago last May?

A. Yes, at the time Mr. De La Nux' young son died.

Q. The time the little child died? A. Yes.

Q. She showed grief at the loss? A. Naturally.

Q. So had you seen her down there before that?

A. I could not give you any dates or years, several times at the different places as I have mentioned.

Q. I was asking down there at Aiea?

A. Well, the first time I saw her in Aiea was in 1902, the beginning of the year.

Q. And when was the next time you can recall?

A. Possibly along about 1904 or 5 when Mr. De La Nux was engineer at Waimalo pumps.

Q. The next time?

A. Possibly in 1908 when he was in Halawa.

Q. When again?

A. Oh, several times after that, after he became mill engineer. [227]

Q. Can you identify any year?

A. No; I wouldn't attempt to, Mr. Withington.

That is all.

Redirect Examination.

Mr. ANDREWS.—You mean to say, Mr. Arnold, you only saw her once in these years?

A. No, several times.

The COURT.—Did you ever see her in Honolulu,

(Testimony of Charles N. Arnold.)

on the Kamehameha IV road, ever visit her place there?

A. I have seen her there, but never visited there, not to my recollection.

That is all.

Testimony of Jesse H. Makanai, for Respondents.

Direct examination of JESSE H. MAKANAI, called for respondent, sworn, testified as follows:

By Mr. ANDREWS.—What is your name?

A. Jesse H. Makanai.

A. Where do you live? A. Halawa.

Q. What is your business?

A. Working for the county, government work.

Q. Do you know Mr. George De La Nux?

A. Yes.

Q. You know where he lives? A. At Aiea.

Q. You know Mrs. Rebecca Houghtailing?

A. Yes. [228]

Q. Now, in the first part of 1917, did you visit the house of George De La Nux when Mrs. Houghtailing was staying there? A. Yes.

Q. Did you ask her—did you have any conversation with her about her staying down there?

A. Yes.

Q. Tell us what you remember of that conversation.

A. When I met her I asked her, "How is it that you are staying here with your big boy?" He (she) said, "I am—my stopping here is very good; my health is good, at least my body is fine." I asked

(Testimony of Jesse H. Makanai.)

her about some disagreement between George and his brothers.

Q. Yes, go on?

A. She says, "Because they are ignorant the same as I am," she says, "They ain't like his brother; I like this one better, the elder brother."

The COURT.—What do you mean by (speaking in Hawaiian) "Hupo."

WITNESS.—(Through interpreter.) She didn't define to me what she meant by the word.

The COURT.—Mr. Interpreter, do you define that as ignorant? It is not necessarily ignorant,—isn't there some other meaning?

INTERPRETER.—"Hupo" would be stupid, not educated, not smart.

Mr. ANDREWS.—Would it be foolish?

INTERPRETER.—*I* could be made foolish, no good; it all depends on how it is applied.

Mr. ANDREWS.—At the time that she had this conversation with you was she intoxicated or was she sober? A. She was not.

Q. She was not what?

A. Was not drunk. [229]

Q. Perfectly sober?

A. When I was talking with her at that time she hadn't had any drink.

Q. And did she seem to understand what she was talking about? A. Yes.

That is all.

That is all.

Mr. ANDREWS.—I will have to recall Mrs. Houghtailing with the permission of the Court.

Testimony of Mrs. Rebecca Houghtailing, for Respondents (Recalled).

Mrs. REBECCA HOUGHTAILING recalled for further cross-examination by respondents.

By Mr. ANDREWS.—I would like to state, about my remembrance, is *is* that I went into it fully, the conversation she was supposed to have with De La Nux and Mrs. De La Nux after the visit of Breckons in which she told them she was foolish about this matter, and wanted George to have all the property.

The COURT.—I don't think so; she is recalled for further cross-examination.

Mr. ANDREWS.—Mrs. Houghtailing, you know a man by the name of Donald K. Hulapa?

A. No, I don't know that name.

The COURT.—Daniel?

Mr. ANDREWS.—Yes, he used to be a man working around in the abstract office, title searcher.

A. I don't remember. [230]

Q. Well, I can't bring him in because he is paralyzed, have to have him carried in—some trouble with his feet.

The COURT.—Where does he live, Mr. George De La Nux?

Mr. DE LA NUX.—Halawa, Aiea.

Mr. ANDREWS.—You remember when Charley De La Nuz was working at the Waimea pump in 1908 or 1909, that you met a man by the name of Hulapa, or any other man at Charles' house, and Daniel's

(Testimony of Mrs. Rebecca Houghtailing.)

wife, and you and he were there sitting on the verandah and he asked you if you were still living in Honolulu and had your property there, and you said that all your land belonged to your grandchildren, and he asked you, "How is that?" and you said, "Well, I don't like my two boys because they are two drunks, but I like George. I wanted to give the property to George, so he didn't like it, so I gave it to his children"—any conversation like that take place? A. No.

Q. With anybody?

A. No; I ain't going to talk about that with anybody, talk about this thing with everybody; it is nothing but this property, nothing but this property all the time—the idea!

Q. I understand that it never occurred?

A. The idea!

Q. I have mentioned Daniel Hulapa or any other man whose name*d* you don't remember now, at Charles' place at Halawa?

Mr. LARNACH.—I understand it was at George's place.

Mr. ANDREWS.—At George's place,—you were down there?

The COURT.—Did you have a talk like that at George's place? A. I have, your Honor.

Q. And his wife,—what is the wife of Hulapa, her name?

Mr. ANDREWS.—I don't know, your Honor. [231]

WITNESS.—I didn't get acquainted with the

(Testimony of Mrs. Rebecca Houghtailing.)

woman until I was there. Oh, my!

Mr. ANDREWS.—Did you know Jesse K. Kaae,—Mrs. Kaae? A. Yes.

Q. Now, Mrs. Haaeho, she is some cousin of yours, isn't she? A. Not that I know of.

Q. Don't you call her cousin?

A. She calls me cousin; I don't know anything about her relationship; she seems to know all.

Q. Now, do you remember in Kalihi in 1905 she coming to your house one afternoon and asked you whether it was true you wanted to see her, you saying you wanted her to live with you,—she afterward lived with you some time after that? A. Yes.

Q. That is correct, isn't it? A. Yes.

Q. She and her husband went to live with you?

A. Yes.

Q. After that in your house in Kalihi during 1905 one time about July of that year you and her husband got talking about a deed to George's children having all your property and her husband said to you, "If you are going to fight against that deed I am going to be a witness for George, your son." Any such conversation take place?

A. Not that I remember.

Q. And that the next day that Jesse spoke to you about it, and asked you what her husband meant by saying he would be a witness for George, and that you said, went along a conversation about the three boys you had, that you had deeded your property—deeded it to his children, all your property, that you thought her husband had forgotten all about it? [232]

(Testimony of Mrs. Rebecca Houghtailing.)

A. No, let me answer your question, please. It seems to me all my affairs, these people come to see me, are all interested in my affairs, asking, "What about the children, what about the property?" I think when they come to my house they come to enjoy themselves and drink, but not to come and ask questions, but it seems now every time is the question about my children, which they don't care about; now they didn't seem to care about my children, now they seem to care about the interest of each of us, they seem to care, but then they don't care; they only come to drink with me.

Q. Do you mean to say that never occurred what I have just asked you? A. No; I don't remember.

Q. And then—did you have a further conversation with him, with her—and you said, "Now, your husband remembers about it I guess I will leave it alone; I will not do anything further."

A. I said to her husband?

Q. Did you say to Jesse, "As your husband remembers about this matter I think I will drop it?"

A. No.

Q. And then she asked you about your other two boys, that you had made a deed to George's other two sons, and you said that you have nothing to do in regard to the other two boys, anything like that said?

A. No; just as I told you a little while ago.—no. Mr. Andrews.

Q. She said to you, "Aren't you going to give anything to your other boys?" And you said, "No, because they are mean and nasty; you have heard them

(Testimony of Mrs. Rebecca Houghtailing.)

curse me," and you repeated the words the other two boys used towards you—anything [233] like that said? A. No.

Q. Then, do you remember her coming to you, after the paper having come out with an account of your being put under the spendthrift trust, she coming to you the next morning? A. No.

Q. She commencing to cry when she saw you, and then you asked her why she was crying; did it happen? A. I do not know.

Q. Did it happen? A. I do not know.

Q. And she said, "I am crying because of what I saw in the paper, that you had been put under a guardianship for a spendthrift, drunkard," and you said, "No, I know what I am doing," and she said, "What are you doing?" and you said to her, "Mr. Steere put me up to that so I could break the deed to George's two boys." A. No, sir.

Q. "Why don't you let them go, rather than insult your family name, putting yourself under a trust like that," and you said, "Oh, it is nothing, because when the case is all over it is going to be ended"; anything like that said? A. No.

Q. And then Jesse said to you, "No. it will remain in the records of the court all the time," and you said, "No, we can have it wiped out when"—or words to that effect? A. No.

Q. Nothing like that happened? A. No.

Q. Now, do you remember when you were—went down to George's house to live, after the visit of Breckons, the early part of [234] 1917, one even-

(Testimony of Mrs. Rebecca Houghtailing.)

ing you calling, saying, "Mrs. Houghtailing, I want to speak to your husband—Mrs. De La Nux, I want to speak to your husband," and taking her and George into the parlor with you?

A. That I don't remember.

Q. You don't remember that?

A. No, but I remember going down there and staying there.

Q. When you got into the parlor there you had a conversation with her about—with George, about how he had been foolish, how you was sorry of what you had done, but that you asked George to promise you to remember Henry, give Henry some money.

A. That is very silly.

Q. That isn't so, is it? A. No.

Q. And George said, "What is the use of giving Henry any money, because he would drink it up? I want it fixed," and you said you would do whatever he said, and he said, "I want it fixed so it will be settled on Henry's children."

A. I don't remember; I don't think he said so.

Q. You said you left it entirely to him to do whatever he thought was right, but you wanted him to remember his brother Henry, or words to that effect?

A. No.

That is all.

Cross-examination.

Mr. LARNACH.—I will ask you this: Did you have a conversation anything like that at that time with George and his wife and you?

A. About what? [235]

(Testimony of Mrs. Rebecca Houghtailing.)

Q. Anything that you have said that was said or anything like that, about your knowing that it was all right about the deed, you wanted to straighten it out so that George got everything, but you wanted him to promise to make some arrangement for Henry; did you say anything like that?

A. No; the only conversation we had was the one with Mr. Breckons.

Q. No; when you were living down with him?

A. No; why should I say anything like that when he already had it in his hands?

That is all.

Mr. LARNACH.—(Further cross-examination.) Now, while you were visiting your son George and on the occasions that Mr. Andrews has drawn your attention to, did you indulge in any liquor down at Aiea? A. Now and then.

Q. Who supplied you with that liquor?

A. My son George.

Q. (Mr. ANDREWS.) I object to that; that is not proper.

Objection overruled.

That is all.

Testimony of Mrs. Kaae Haaeho, for Respondents.

Direct examination of Mrs. KAAE HAAEHO, called for respondents, sworn, testified as follows:

By Mr. ANDREWS.—Now, we will take up her examination where she left off. If I remember correctly, in your other examination you said you had lived with Mrs. Houghtailing, you and your [236] husband lived with her in 1905? A. Yes, sir.

(Testimony of Mrs. Kaae Haaeho.)

Q. Do you remember a conversation which she and your *husband her* in or about July, 1905?

A. Yes, sir.

Q. About her property? A. Yes, sir.

Q. Now, will you tell the Court just what you heard of that conversation?

A. It was on the verandah of her home; we were sitting near together, near by, as far as here where I am sitting now to there (indicating the attorney who was standing by the witness-stand); they were talking about some deed, she is going to put it in court, she said, "I am going to have my petition in court to break that deed"; then he said "What deed?" that is, my husband said that, and she stys, "Oh, I have done gave it to my son's children." And she says, "Go ahead; I will get evidence for the boy because I didn't—

The COURT.—Your husband said that?

WITNESS.—Yes, in a sassy way to him, "Certainly," my husband says, "Certainly."

Q. Was anything else said?

A. "Then you go out and get evidence for George," and he said, "Yes, for the truth, I am going to come on the stand for that boy," so that conversation was dropped right then and there. Finally, the next day my husband went down to Puuloa to search for another job; we were all alone at the house; we were around there talking over things, and I brought the conversation to her, and I said, "What about?" and she got up, "About this deed to your 'Mopunas,'" "My big son." "Why, have you got another son?"

(Testimony of Mrs. Kaae Haaeho.)

[237] "Yes, don't you know it? I have another keiki?" "No, I only know two; you always introduced me to the other two; you never told me you had another one." "Oh, yes, I have three, that is our keiki 'Haku'" (speaking Hawaiian), called "Lord of the family," so she started to tell me all about this, she had deeded to George's two sons all what she had, and in my question I says, "What about the other two keihis, Henry and Charley?" "Oh," she said, "why, oh, you know what they are; they are mean and nasty to me; George is the best keiki; he treats me as a mother, and the other two know that; they don't treat me as a mother, abuse me as if I was nobody to them." "But I think you have done wrong; you ought to give something to the other two boys." "Oh, plenty of time for that; I can fix that up some day or other; you never need mind meddling in my business." I said, "Of course not," and then the conversation was pau; she didn't bring it up until my husband died, then I saw an article in the papers that Steere was put under guardianship as a spendthrift and as drunkard, so I went up early the next morning to her house I saw her on the verandah; she greeted me, and I cried, and she said, "What are you crying for?" I said, "Oh, I am—I feel hurt at heart." She says, "For what?" "The idea that you should go and allow yourself to be put on the spendthrift and a drunkard, a good family like yourself and mine be known in public that you are put under a spendthrift and drunkard." And she said, "That is nothing." I says, "Nothing?" "Yes,

(Testimony of Mrs. Kaae Haaeho.)

nothing." I says, "How did you come to do this?" "Oh, it is merely Mr. Steere put me up to this to break the deed to get back [238] the property again." I says, "It is a very poor way," and she says, "So that I could get something for Henry and Charley." I says, "There is lots of allowance you could make for the other two, but it is a disgrace to go into court, and put yourself as a spendthrift, when I never knew Henry—put yourself as a spendthrift and a drunkard, lose your own senses; you always a lady in your own house, a house that is always clean and tidy; a drunkard lives in shacks, that is what I call a drunkard," because I am talking to her; then she says, "Oh, don't be like that; people don't believe that in court." "That will live in the court records from generation to generation." "Oh, no, it will be all over when the case is over." I said, "Nothing at all; no, whoever advised you advised you wrong." She says, "No"; and I said, "It will be there from generation to generation." "Oh, that we will fix up by-and-by," and I said, "All right."

Q. Now, Mrs. Haaeho, when you—in the first conversation you speak to her, after she had this conversation with your husband, did you ask her anything about who suggested to her of deeding her property to George's boys? A. Oh, yes.

Q. What did she say to that?

A. Her own free will.

Q. Now, are you related to Mrs. Houghtailing?

A. Yes, I am.

Q. In what way?

(Testimony of Mrs. Kaae Haaeho.)

A. My grandmother and grandfather are first cousins.

Q. You have known her all your life?

A. I have known her when she was a girl; I know her mother, [239] know her father.

That is all.

Cross-examination.

Mr. LARNACH.—Now, you stated that in 1915 you asked Mrs. Rebecca Houghtailing whether she had any other sons besides George; that is true, is it not?

The COURT.—No, besides these two (indicating Henry and Charles).

Mr. LARNACH.—You were acquainted with the other two sons, were you not? A. Yes, sir.

Q. And you had visited in the home there—Henry's? A. Yes.

Q. You stayed there for any length of time?

A. Only of late years, after my husband's death, long before my husband's death, I stayed down at Kauai; I was at Henry's home.

Q. And while you were there Henry fed you?

A. Yes, had to please them, had to please me. I was their guest; I ate at their place with them.

Q. He was apparently feeding your family—feed his family at that time, Henry was?

A. He was.

Q. Did you have any row with Mrs. Rebecca Houghtailing down there at Henry's house while you were staying there in 1915? A. Not that I know.

Q. You don't remember? A. No. [240]

(Testimony of Mrs. Kaae Haaeho.)

Q. You don't remember having to be put out of Henry's house at Moanalua while you were in a drunken condition because of a fight with Mrs. Houghtailing? A. Oh, no, no.

Q. You don't remember, or do you mean to say that you were not put out?

A. I remember I wasn't put out. I was an honorable guest of theirs, Henry and my cousin, Mrs. Houghtailing.

Q. You were a drinking woman? A. I do drink.

Q. To excess? A. Not to excess.

Q. While you were down at Henry's, you didn't drink to excess?

A. We all had a glass of drink; I don't deny that.

Q. Very often?

A. When we wanted to take something.

Q. Did you want it more than once every twenty minutes, or every hour?

A. Not every twenty minutes.

Q. How often was it, Mrs. Haaeho?

A. Three times a day.

Q. Did you keep to that regularly, just three times a day?

A. Not every day; when we got it we drink it.

Q. Was Mrs. Houghtailing there with you?

A. Certainly; she invited me to come down with her.

Q. She used to take it pretty regularly three times a day? A. Just what the ladies drink.

Q. How long did this keep up, what the ladies drink?

(Testimony of Mrs. Kaae Haaeho.)

A. Oh, well, I guess about three days about, every day, not to excess. [241]

Q. You just kept it up for three days at a time?

A. No, not two or three days at a time; I didn't say two or three days at a time.

Q. Two days, maybe? A. A day.

Q. Then you quit for awhile?

A. Not a whole day; I didn't say a whole day.

Q. Then it isn't true that Henry had to chuck you out of the house down at Moanalua in 1915 when you were a honorable guest because you were fighting with Mrs. Houghtailing, his mother?

A. I wasn't—I did—never had any fighting with his mother in his house, never did.

Q. And you were not drunk down there at any time on the occasion I have referred to.

A. Not that I know of.

Q. Had no quarrel with Mrs. Houghtailing.

A. No.

Q. Mrs. Houghtailing had a home on Kalihi road, or Kamehameha IV road, her homestead—you know where that is? A. Yes, certainly.

Q. You have stayed there as an honorable guest, as you have expressed it? A. Yes.

Q. Your husband stayed there? A. Certainly.

Q. For what length of time?

A. Six months, no—yes, six months.

Q. At that time—during that time were you a prohibitionist, or did you take a little drink as ladies do sometimes, as you expressed it? [242]

A. She has.

(Testimony of Mrs. Kaae Haaeho.)

Q. I mean you?

A. I had a little drink; I always took a little drink.

Q. Do you remember that you ever missed part in taking a drink—

Mr. ANDREWS.—I object to that as irrelevant, incompetent and immaterial— A. No—

Objection sustained.

Mr. LARNACH.—How about Mrs. Houghtailing—didn't she drink quite regularly while she was at home, while guests were with her in her house?

A. Not every day, I say.

The COURT.—Didn't get drunk while you were living there?

A. She wasn't drunk; she was a little jolly, that is all. That is what I called getting drunk when you go to sleep.

Q. You don't consider a person drunk unless they are sleeping in the gutter—asleep? A. Yes.

Q. Anything less than that is not a drunk?

A. Yes.

The COURT.—What did she say when she got jolly?

A. She remembered everything.

Q. What would she say or do?

A. She is always in her right senses.

Q. What would she say—anything at all out of the way? A. No, not in my presence.

Q. Was she affectionate or fighting?

A. Not fighting.

Q. Was she affectionate when she got drunk?

A. Very nice ladylike. [243]

(Testimony of Mrs. Kaae Haacho.)

Q. Never swore, anything like that?

A. Not when I was present.

Q. How long had you been in the house with Mrs. Houghtailing when this conversation took place—this conversation in 1917, as I remember it—1915?

A. Six months.

Q. Six months before the conversation took place?

A. I was there before the conversation took place.

Q. How long before? A. Three months.

Q. Three months before the conversation took place? A. Yes.

Q. You are sure of that?

A. I am sure of that.

That is all.

The COURT.—You asked Mrs. Houghtailing why she didn't give some of her property over to Henry and Charley?

A. Yes.

Q. And she said they were "no good," or something to that effect? A. Yes.

Q. She told you that she gave the property over to George or George's children?

A. George's children.

Q. Not to George?

A. George wouldn't accept it.

Q. While you were living there was Bathsheba *was* living there too?

A. No, she was up at Manuole.

Q. All the time that you were there?

A. Yes, all the time that I was there.

Q. Did you know Bathsheba? [244]

(Testimony of Mrs. Kaae Haaeho.)

A. I knew her when she was a little girl.

A. How old?

A. I think about five; she was sitting by her when she was making little dresses for her.

Q. The grandmother?

A. Yes, the grandmother.

Q. The grandmother brought her up? A. Yes.

Q. Was the grandmother fond of her?

A. Very fond of her.

Q. Did you ask the grandmother at that time why she didn't give some property to Bathsheba?

A. No, only about the two boys, your Honor.

Q. You knew that the property had been given to the grandchildren of the boys— A. Yes.

Q. The children of George, I mean?

A. Yes, I knew.

Q. You knew at the time that the property had been given to George's children? A. Yes.

Q. You didn't remind her of Bathsheba?

A. Aole, no, your Honor.

Q. Simply overlooked, overlooked her?

A. No, I didn't mean to overlook her. I think I remembered about the other two boys, she told me that George wouldn't accept the property so she handed it down to George's children.

Q. Well, did you at that time feel surprised that she gave the property to the two grandchildren when you knew she was very fond of Bathsheba? [245]

A. I didn't have that feeling at the time to tell you the truth, your Honor.

Q. How do you feel about it now?

(Testimony of Mrs. Kaae Haaeho.)

A. I am not interested with their property; it is not mine; she could do with it what she pleases; I do what I please with my own property; nobody else's business but my own.

Mr. LARNACH.—Do you remember causing the arrest of Mrs. Houghtailing?

A. That is not in this question, if you please, sir. That is not contained with this case.

Q. That is—his Honor will decide that.

The COURT.—Answer the question.

A. Yes, I did.

Q. How long ago was that?

A. That was in 1915.

Q. While you were an honorable guest of Mrs. Houghtailing? A. Yes, sir.

Q. After one of these big ladylike drunken bouts, was it? A. No.

Q. Will you—you caused her arrest because you had some feeling against her, did you?

A. I have been a guest of them down there three months before that time she took me in the house. Now, I went to a certain place and found everything, and I arrest her.

Q. And you did cause her arrest, you remember that? A. (No answer.)

Mr. ANDREWS.—She has answered that.

Mr. ANDREWS.—This arrest was on account of your husband and her being intimate?

The COURT.—Was that before or after that conversation?

WITNESS.—That conversation was before that;

(Testimony of Mrs. Kaae Haaeho.)

the arrest was made [246] after.

The COURT.—On account of that you had some ill-feeling towards her?

A. I never had any ill-feeling against her until when I—when the fact, when I found out all the facts, I had them arrested.

Q. After that you felt sore?

A. Sore? She asked my forgiveness and I forgive her; then we made up friends again and we both went down to Kauai with my husband and we came back together; she wanted me to live with her and I declined and went to my own brother's home.

That is all.

Mr. ANDREWS.—When did your husband die?

A. Waimea, Kauai.

Q. When? A. November first, 1915.

That is all.

Mr. LARNACH.—With the Court's permission, I would like to ask a question.

Q. While you were staying with Mrs. Houghtailing in 1915, you stated you had a conversation with her, which you have testified to, and in which you stated to Mrs. Houghtailing—

A. What conversation, if you please?

Q. I will tell you; regarding the fact that up to that time you were not aware of the existence of the other two sons? A. Yes, sir.

Q. Now, which sons did you refer to?

A. Charley and Henry. [247]

Testimony of Daniel Holapu, for Respondents.

Direct examination of DANIEL HOLAPU, called for respondents, sworn, testified as follows:

By Mr. ANDREWS.—Where are you living?

A. Halawa.

Q. Living there sometimes? A. Yes.

Q. Do you know Mrs. Houghtailing here?

A. Yes.

Q. How long have you known her?

A. I believe more than twenty years.

Q. Now, you know George De La Nux?

A. Yes.

Q. You know where he was living in 1908 and 1909? A. Yes.

Q. At Halawa? A. Yes.

Q. Where was he working—what was he working at? A. He was in the pump.

Q. Did you see in either of those years, 1908 or 1909, did you see Mrs. Houghtailing down at George's house? A. Yes, sir.

Q. Who was present? A. My wife.

Q. You and who else?

A. Me and my wife, and Mrs. Houghtailing.

Q. Where were you sitting?

A. On the veranda of George's house at Halawa.

Q. Was there any conversation at that time about anything connected with her property? A. Yes.

Q. Now, will you tell us, please, what you remember of that conversation, how it started, what was said?

A. We didn't see for a long time.

(Testimony of Daniel Holapu.)

Q. You hadn't seen her for a long time? [248]

A. Yes, it has been so long since we meet together, and I asked her, how she living, she says, "All right," and I asked if she lived at Kahlu, and she said, "Yes," she told me that property belonged to George's children. I said, "How is that?" "Oh, I give all my properties to them; I give to George but George don't like it, so I give to his children, all my property, because I don't like my other two boys; they was drunks."

Q. How long since you have seen George up till yesterday? A. About seven years.

Q. And you mentioned this conversation to the gentleman behind you the day before yesterday?

A. Yes.

That is all.

Mr. ANDREWS.—Oh, I will ask, was Mrs. Houghtailing sober when she had this conversation with you in 1908 or 9. A. No, sir.

Q. Was she sober—do you know what I mean?

A. Yes, a little drinking, but not drunk.

Q. Talk as if she knew what she was talking about?

A. Yes.

That is all.

Cross-examination.

By Mr. WITHINGTON.—I understand you that this conversation took place in 1908 or 1909?

A. Yes.

Q. Quite sure of that?

A. Yes, what I believe.

Q. How do you fix it in 1908 or 9?

(Testimony of Daniel Holapu.)

A. See, I remember so many years, I remember how, you know, [249] at that time, that is, the time when I—when Mrs. Houghtailing talked to me down at George's house, because I remember one of George's brothers worked at Waimalo pump; that is how I remember.

Q. So you fixed the time when one of George's brothers was working at the Waimalo pump?

A. Yes.

Q. You say your wife and Mrs. Houghtailing were there present; who else was present at that time?

A. Yes.

Q. Nobody else? A. Nobody else.

Q. And the place was in George's house or on the lanai—which was it? A. Yes.

Q. Which was it, on the lanai?

A. On the lanai.

Q. The next time you spoke of it was to Mr. Makanai, of this conversation?

A. You see the night before last I called him to come up to my house—to my husband.

Q. What is that?

A. I called Makanai to come up to my house the night before last and I asked Makanai if I didn't mistake—I saw Makanai somewhere around in town the day before, and he said this, he told me, that he was coming, that he come up for this matter, and I said, "What is the matter?" because I don't know nothing about it, that is the first time I heard of the case, and he says about a deed of Mrs. Houghtailing to George's children. Well, Makanai don't explain

(Testimony of Daniel Holapu.)

to me nothing, but I told Makanai [250] what I tell now in the presence of the Court.

Q. Now, up to that time you hadn't spoken of it to anybody, up to night before last?

A. You see—

Q. Don't you understand, up to 1908—up to night before last you hadn't spoken of this conversation to anybody? A. Yes.

Q. That is correct? A. Yes.

Q. You—the first you knew of any suit was the day before yesterday?

A. From Makanai, that is the first I knew.

Q. You have been a witness frequently in court, Mr. Holapu, many times? A. Yes.

Q. A great many times? A. Yes.

Q. Hasn't that been your business, too, wasn't it for many years, to get evidence in lawsuits—didn't you follow that business of getting evidence for lawsuits? A. Yes.

Q. Did I understand you to say at this time in 1908 Mrs. Houghtailing was a little drunk?

A. Yes, sir.

Q. Who supplied that, who furnished it—did George furnish it? A. I don't know who did.

Q. Was it furnished there at the time at the house?

A. I don't know.

Q. Did you bring any there? A. No. [251]

Q. Then it was furnished at the house?

A. What is it?

Q. Did—George and his wife furnished it, did they? A. I don't know who furnished it.

(Testimony of Daniel Holapu.)

Q. I am trying to find out where you got this liquor that you saw you had there, a little?

A. No, I don't know.

Mr. ANDREWS.—He didn't have any; he thought she was under the influence.

Mr. WITHINGTON.—You yourself didn't take any drink at that time?

A. No.

Q. You thought she was under the influence of liquor? A. By the smell of it.

That is all.

That is all.

Testimony of Mrs. Lahapa De La Nux, for Respondents.

Mrs. LAHAPA DE LA NUX, called for respondents, sworn, testified as follows:

Direct Examination.

By Mr. ANDREWS.—What is your name?

A. Mrs. George De La Nux.

Q. Are you the mother of George and Daniel De La Nux? A. Yes.

Q. And Daniel is still living and George is now dead; is that right? A. Yes.

Q. When did George die? A. A year back.

Q. Do you know Mrs. Rebecca Houghtailing?

A. Yes. [252]

Q. When did you first see Rebecca Houghtailing?

A. In my own home, at Kohala, Hawaii.

Q. What was George doing then in Hawaii?

A. He was sugar boiler.

Q. What plantation? A. Paauhau.

(Testimony of Mrs. Lahapa De La Nux.)

Q. Do you remember the year that she first came to call on you at your home—remember what year it was?

A. It is too far back; I can't remember.

Q. Well, what happened when she came up there?

A. When we—when she came up there we got married.

Q. Did she have any conversation with George or anything about George's future? A. Yes.

Q. Well, what was said in your presence?

A. She said before she came back to Honolulu, she asked George to allow him to come down with her to live in Honolulu.

Q. Well, did she want George to come to Honolulu,—was there anything said about that?

A. George refused at that time because he had to work.

Q. After that what happened?

A. (Through interpreter.) She (witness) says George repeatedly—she told George repeatedly to come to—to come with them, never mind about work, "Leave the work, I will take care of you."

Q. Now, then, did she go away, back to Honolulu?

A. Yes.

Q. Well, then, all right; you folks stayed there up in Hawaii? A. Oh, a year after that. [253]

Q. You came down to Honolulu, you and George?

A. Yes.

Q. Now, where did you go to live?

A. With her.

Q. How long did you stay—did you and George

(Testimony of Mrs. Lahapa De La Nux.)

stay? A. It is six or seven weeks.

Q. Where did you go then to live?

A. I went down to Aiea.

Q. And did George get a position there?

A. Yes.

Q. And after that, since that time, where have you lived? A. Aiea.

Q. You lived at Aiea—did you live at Halawa, and back again to Aiea, is that right? A. Yes.

Q. Did you live at Waimalo, too?

A. Yes, we stopped at Aiea, then we went to Waimalo, and from there, Waimalo, to Halawa, and from Halawa went back to Aiea.

Q. Now, then, did Mrs. Houghtailing ever come to see you while you were living at these places you have mentioned? A. Yes.

Q. Now, where was your first child born?

A. Aiea.

Q. That was George, was it? A. Yes.

Q. Now, after that, after the birth of George, was there any talk between Mrs. Houghtailing and your husband about property or anything like that, if what, tell us. A. Yes.

Q. Tell us what you remember of this conversation, where they were, and what happened. [254]

A. She came down and said to George, "I want to deed over all this property to you," and George said, he didn't want it that way (Mr. Withington interrupts).

(Question repeated.)

A. It was at Aiea.

(Testimony of Mrs. Lahapa De La Nux.)

Mr. ANDREWS.—All right, now tell us about, you were telling us some of it. How old—

INTERPRETER.—She didn't give me the time, I asked her, but she gave me the place and not the date.

WITNESS.—By the year?

Mr. ANDREWS.—How old is your first child?

A. She said first she wanted to give this property to George, and George said he didn't want to have it put on to him because he has got some younger brothers.

Q. Go on.

A. Says, "I didn't look at that. I want to put it all on you."

Q. Now, then, what did George say to that, if anything?

A. He refused up to the time that Charles was born—George.

Q. The name of the child is Daniel.

A. No, it is the first child. I don't know how long it was after that, but I was carrying the second child.

Q. Now, let us get that, Mrs. De La Nux, for a minute, how long after the, your first child—withdraw that—how long after you first went to Aiea did Mrs. Houghtailing have this first talk with your husband—can you give us any idea, a few months before George was born, or after, or when, the first time?

A. Before George was born.

Q. Then did she speak of it again?

A. Yes. [255]

(Testimony of Mrs. Lahapa De La Nux.)

Q. Now, I understand—how many times did she talk of it before the second child was born?

A. There are quite a number of times, I can't remember how many.

Q. Now, then, after—where was the second child born, where were you living then? A. Waimalo.

Q. Do you remember any conversation with Mrs. Houghtailing after the second child was born, about this matter? A. Yes.

Q. Well, what do you remember was said? Tell us about that.

A. She said that she was feeling well enough not to be delaying about this matter, she wanted it fixed up. I thought at that time the first time that George consented but not to put it, put the property on me, but put the property on my children if you want to.

Q. Now, after that did you ever—did you do anything about it, is there any time that you did anything about it—withdraw the question. What happened after that?

A. Yes, they fixed it up, then she said to George, my husband, to go and make it right, make the instrument.

Q. Did you and George go anywhere—if so where?

A. When—yes, when the deed was made in front of Correa I was there, too.

Q. How did you get there?

A. In the presence of Correa.

Q. How did you get there?

A. Mrs. Houghtailing told the two of us to go there.

(Testimony of Mrs. Lahapa De La Nux.)

Q. How did you go?

A. We went on the train, came on the train to Honolulu.

Q. Who did? [256]

A. Myself, Mrs. Houghtailing and my husband.

Q. So, where did you go?

A. We went into the office of this lawyer.

Q. What happened in there, to the best of your remembrance?

A. I sat down and then I understood for the first time about this deed; he took it out and read it to Mrs. Houghtailing.

Q. After he read the deed what happened?

A. After he read the deed he said, "How is that—all right?" and Mrs. Houghtailing said, "All right."

Q. And Mrs. Houghtailing said—

A. She consented.

Q. Was the deed made when you got to this lawyer's office? A. Yes.

Q. After she said it was all right what then?

A. Then Mr. Correa told Mrs. Houghtailing and George to go there to where the notary was.

Q. Did you go over there?

A. No, only those two went; I went another place.

Q. Now, after that did you use to visit Mrs. Houghtailing's house in Kalihi?

A. Yes, sometimes.

Q. Your children visit there?

A. When I go there my children would come with me.

(Testimony of Mrs. Lahapa De La Nux.)

Q. Did she use to visit you down at Aiea?

A. Yes.

Q. Now, she has said that some years after this you accused her of calling your childen "niggers" and there was a fight and you threw stones—that you threw stones?

A. I don't know anything about that.

Q. Did that ever happen? [257]

A. No, that is the first I ever heard of it.

Q. Now, do you remember the time that Mr. Larnach and Mr. Breckons and Mrs. Houghtailing came down to your house at Aiea about 1916, before this suit was brought? A. Yes.

Q. Now, will you please tell us what you remember of that?

A. It is my remembrance at that time that my son George was sick; I was in the room with my sick child, when the housemaid came and told me there was somebody outside.

Q. Who was there?

A. Mary Ann Lee, Mr. Breckons, Mr. Larnach and Mrs. Houghtailing and Mrs. Charles De La Nux.

Q. They were there in your house? A. Yes.

Q. Now, there has been testimony by Mrs. Houghtailing, or I think Mrs. Charles De La Nux, that you brought out some gin for them to drink, is that true?

A. No.

Q. Now, what happened after you came in the room and saw them there?

A. When I came into the room Mrs. Houghtailing was crying. I went over and sat down with her and we both cried over the child's health.

(Testimony of Mrs. Lahapa De La Nux.)

Q. Go ahead and tell what happened after that.

A. Then Mrs. Houghtailing asked, "Where is your husband?" I said, "He is at work."

Q. All right; you sent for George at their request, didn't you? A. Yes.

Q. Now, then—

A. So they said for me to telephone to my husband as they wanted to see him. [258]

Q. All right, you did, and he came?

A. Yes.

Q. Now, after he came, did you stay and listen to the conversation? A. Yes.

Q. What did you hear? Tell us.

Mr. WITHINGTON.—That is, she spoke English so that she understood it. I don't want to object to her testimony so far as she is able, but there is no evidence that she understood it.

Mr. ANDREWS.—You understand English?

A. Some.

Q. And you speak some?

A. Oh, a little bit. I couldn't understand any difficult passage.

Mr. ANDREWS.—What did you hear said?

A. Breckons then said to George, "We have come here under the order of your mother to change the deed that was made before."

Q. Yes, what else was said?

A. She says, "On account, all that I wanted, your mother wanted to give under this deed was the home at Kalihi, the rest of my property was to be divided between George, Henry and Charley."

(Testimony of Mrs. Lahapa De La Nux.)

Q. Who said this? A. Breckons.

Q. Go ahead; what happened after that?

A. Then George said, "The instrument ain't made that way."

Q. The COURT.—Wasn't made that way?

A. Yes.

Mr. ANDREWS.—What happened after that? Go ahead. [259]

A. He says, "That isn't how the instrument was made; the instrument was made, 'all the property belonging to my mother was deeded to my two children.'"

Q. Go on.

A. And then he asked his mother, "Isn't that so, Mother?" And she said, "Yes."

Q. What happened after that?

A. And he said, "Ain't that so, you put all this property on to me and my children on account of my brothers of being bad to you, spoke bad about you?"

Q. Go on; what happened after George asked her that?

A. Then mother commenced to cry and said she didn't know.

Q. What happened after that?

A. Then at that time my sick child called to me to come into the room and I went into the sick child.

Q. Did you hear any more?

A. Not at that date.

Q. Not at that meeting?

A. Not at that meeting.

Q. Now, this question of this bringing the gin; will

(Testimony of Mrs. Lahapa De La Nux.)

you tell us whether there was any gin there, and if so what was done about it?

A. Yes, when I came in I saw the bottle of gin sitting on the table.

Q. You didn't bring it in? A. No.

Q. Did you see anybody drink there that day?

A. Yes.

Q. Who?

A. Mr. Breckons, Mrs. Houghtailing, my mother-in-law, Mary Ann Richards; that is all, only those.

Q. How many drinks did Breckons take, do you know? [260]

A. I don't know how much, but what I saw was two glasses.

Q. Did you see your mother-in-law take any there?

A. Yes, a little bit.

Q. How many times?

A. I think it was only one time, but I am not sure.

Q. How about Mary Ann Richards—did you see her take any? A. Yes.

Q. How many did she take?

A. I don't know—once or twice; I don't know.

Q. Now, after that conversation did Mrs. Houghtailing come down to your house to live?

A. Two weeks after this meeting she came in.

Q. And was anything said by her when she came down to your house to live at that time? A. Yes.

Q. What was said, if you remember?

A. "I have come down here to live with you on account of stopping that proceedings I have taken before. I know that I gave you and my grandchildren

(Testimony of Mrs. Lahapa De La Nux.)

this property and I want you to stop this business."

Q. Was—how did—how long did she stay with you at that time?

A. I think about two or three months.

Q. Do you remember any talk she had with you and your husband—in the evening, that she was down there, about this property? A. Yes.

Q. Well, now, tell us about it, where it happened, where it was. A. In our parlor.

Q. Tell us what you remember of that. [261]

A. After—before supper—"after supper"—she says, "After supper I want you to have a talk with me," and we consented; after supper then we went into the parlor, then started in to converse.

Q. What did she say?

A. "I want to ask your forgiveness to you for all the wrongs I have done," she said to my husband, and George said to her, "Why, what was the reason of your doing this?" "This wasn't of my own thoughts; it is from Mary Ann Richards, and Charley De La Nux's wife, and the other two boys."

Q. What else did she say?

A. "I want to have everything straighten up—no rows; I want this guardianship of Mr. Steers to be taken away, and for you to be my guardian."

Q. Go on.

A. "Don't you think," he says, "that the other folks will say that I am putting you up to this?"

Q. George said that? A. Yes.

Q. Go on.

A. She said, "I don't care for that; I don't want

(Testimony of Mrs. Lahapa De La Nux.)
to look for that," she says, "I want this done quickly because I am sick."

Mr. WITHINGTON.—This was in 1916?

Mr. ANDREWS.—Yes, 1917, along about Christmas.

Q. I will ask her, this was the time that she said to you in the early part of 1917?

Mr. WITHINGTON.—I object to that. I want to ascertain when this conversation was.

Mr. ANDREWS.—Well, when was this conversation in relation to her visit with you—was it during the time she stayed [262] two months, two or three months?

A. Yes, that is the time she was sick.

Q. Now, then, you were in the middle of it, you told us about some of it; tell us something else that was said by her about George being her guardian.

A. She says, "I am sick; I have come down here; I have nobody to take care of me."

Q. She said something about wanting George to be her guardian; did she says he was going to fix that up for her—who was to arrange that part of it?

A. The son said, "We will go to"—mother said, "We will go to Judge Whitney."

Q. All right; was anything said at that time about Henry, about George's brother Henry?

A. She wanted to deed all the property over to George and his children and his wife on account she had some trouble with Charley's wife, because she didn't want Charles' wife, she was angry.

Q. Now, the question was, was anything said about

(Testimony of Mrs. Lahapa De La Nux.)

Henry, that she wanted anything done for Henry or not?

A. That was one thing, "I will ask you after this thing is all settled up for you to remember your brother Henry."

Q. Who said that? A. Mrs. Houghtailing.

Q. Well, did George say anything to that?

A. Then George said, "If that is the way, in that case the best thing you can do is to give her that money."

Q. Give who?

A. To give Henry's children a thousand dollars, something like that; the reason George said this was on account of Henry was a drunkard, it would be better to leave the money to the grandchildren. [263]

Q. Did he tell her that, to Mrs. Houghtailing?

A. Yes, he said that to the mother.

Q. At the time that Mrs. Houghtailing had this conversation with your husband and yourself was she sober or drunk? A. She was in—sober.

Q. At any time during the time that she lived with you was she ever drunk?

A. No, every time she came and stopped with me she was drinking, but not drunk.

That is all.

The COURT.—The case will be continued until tomorrow morning at nine o'clock.

(Testimony of Mrs. Lahapa De La Nux.)

Friday, June 20, 1919, 9 o'clock A. M.

Mrs. GEORGE DE LA NUX (Continued)—Cross-examination.

Mr. WITHINGTON.—Mrs. De La Nux, I understood you to say that you didn't know anything about the "nigger" incident, the first you heard about it; is that right? A. I don't understand.

Q. Well, I will ask you in a little different form; did you on direct examination say you didn't know anything about the "nigger" incident, the first you have ever heard about it?

Mr. ANDREWS.—Does she remember that she testified that she never heard of the incident of accusing Mrs. Houghtailing of calling her son a nigger? A. No.

Mr. WITHINGTON.—She didn't testify so, or that is true?

A. No, I haven't; that she does not know. [264]

Q. Do you remember any row or disturbance at Mrs. Houghtailing's house between you and her about 1910 or 1911? A. No.

Q. Do you mean to say that there wasn't any?

A. I don't know.

Q. What do you mean—you don't know, you don't remember any such a row, or you don't know whether there was or not?

A. I can't say that I was the one because I didn't know of any happening.

Q. Let me see whether I can refresh your recollection at all. Do you remember being there in 1910 or

(Testimony of Mrs. Lahapa De La Nux.)

1911 with your husband and drinking with Mrs. Houghtailing? A. No.

Q. Well, were you or were you not there at any time during those years, drinking with her, your husband being there at the same time?

A. No.

Q. Do you remember any occasion when there was any running around the yard, you and Mrs. Houghtailing, and picking up stones or sticks to throw?

A. I don't know anything about this, not a lady of that reputation doing that sort of things, that sort of work.

Q. Do you remember, leaving out any stones and any sticks, being, in 1910 or 1911, being out in the yard with Mrs. Houghtailing without any dress on, in your chemise?

A. I am not a lady used to that sort of thing.

Q. I am asking you whether you remember any such occasion—I don't know what sort of a lady you are. Tell me whether you remember any such occasion.

A. I don't understand anything about that.

Q. Do you mean to say you don't remember any such occasion? [265]

A. Never was done, not even to this day.

Q. You do not at that time at or about that time indulging in what you call "nuku-nuku" in the yard with Mrs. Houghtailing? A. No.

Q. You don't remember your husband taking on such an occasion, taking you back into the machine and when you arrived at your house at Aiea don't

(Testimony of Mrs. Lahapa De La Nux.)

remember then of still being boisterous?

A. From what place to, my husband coming to get me?

A. That is, taking you from Mrs. Houghtailing's house on Kamehameha IV road out to your house at Aiea? A. No.

Q. Do you know a Mrs. Manuel Moses?

A. I ain't acquainted with her.

Q. You don't remember—you say there was no such incident. Let me refresh your recollection a little further; you remember of her trying to fix your dress on that occasion? A. No.

Q. Or putting your dress on?

A. I don't know that.

Q. As far as you know you never did that, never did have any difference with Mrs. Houghtailing at any time, any row?

A. Of course there is sometimes a disagreement in the family, but she might have got excited, but I was never that way.

Q. Do you remember any such occasion in 1910 or 1911 when she got excited with you?

A. I can't remember anything about that.

Q. Or any other time? [266]

A. I don't remember anything about it.

Q. How many children have you?

A. Four; three living now.

Q. How many by the defendant, George De La Nux? A. Two.

Mr. WITHINGTON.—Coming now to the time when Mr. Breckons and Mr. Larnach was out there,

(Testimony of Mrs. Lahapa De La Nux.)

I wish you would relate again exactly what took place, what was said and what was done.

A. They came there—when they got there I was in the room with the sick child, and a servant came to me and said. "There is somebody in the house that wants to see you," when I went into the parlor; they were sitting in the parlor, Mrs. Houghtailing, Mr. Larnach, Mr. Breckons, Mary Ann Lee De La Nux.

Q. What was said and done?

A. When I went in I went over to my mother-in-law; she was crying; we sat down and cried together. She then said, Mrs. Houghtailing, she wanted to see my husband, and I went and telephoned to my husband to come home; then my husband came there and sat together with us, and Mr. Breckons asked my husband, asked him regarding this property that is in dispute, he says, "Your mother says she didn't give all this property to your children, but David only gave the property at Kalihi," and George denied that.

Q. What did George say?

A. He says that wasn't what was done; what was done was that all the property was given to me and my children—only given to the children.

Q. What next?

A. Then the lawyer said something, and then George asked, [267] "Mother, didn't you give this property to me out of your gratitude?" and mother consented she did.

Q. What were the words of Mrs. Houghtailing?

A. She consented, she said, "Yes"; he asked the question and she consented.

(Testimony of Mrs. Lahapa De La Nux.)

Q. Do you mean to say her word was "Yes."

The COURT.—She said, "yes," not consented.

INTERPRETER.—Yes.

Mr. WITHINGTON.—What took place next?

A. He says, "Wasn't it the reason you gave over this property on account of my brothers doing wrong to you?" Then she said it was; she didn't remember that.

Q. What next?

A. Then my sick child called to me to come into the room and I went into the room with my child.

Q. You said in your direct examination, or I think—withdraw that question and put another. Did you hear any further conversation at all at this time at this interview?

A. They were talking in there but I couldn't understand what they were saying.

Q. So that this is a fair statement, is it, that after this you heard them talking but didn't hear anything which you now can remember?

A. Yes, I didn't understand what they were saying.

Q. Didn't hear anything said about the deed of trust? A. No.

Q. You said that at the same time you saw a black bottle of gin in the room; when did that first appear?

A. I didn't say black bottle.

Q. A bottle of gin, then? [268]

A. When I came out again then I saw that bottle of gin there.

Q. When did you come out?

A. After I got through looking after my child.

(Testimony of Mrs. Lahapa De La Nux.)

Q. How long did this *part* stay there after that?

A. I don't remember.

Q. Some time?

A. I don't remember; maybe long; I don't remember.

Q. But after you—the first you saw of the bottle of gin was after you came out of the child's room?

A. Yes.

Q. You hadn't seen it before? A. No.

Q. Where were the glasses—were there any glasses? Yes.

Q. Whose glasses were they?

A. That comes from my house.

Q. Do you know where the gin came from?

A. I don't know where it came from, but it was in the house.

Q. Did you see any drinking before you came out of the room, out of the sick-room, I mean?

A. Mrs. Houghtailing told her son that Mr. Breckons wanted something to drink.

Q. Oh, then you did hear something when you were in the sick-room?

A. I was in the room when I heard that.

Q. In the main room? A. Yes.

Q. What part of the conversation was that?

A. What?

Q. When did Mr. Breckons say to your son he wanted a drink?

A. No; Mrs. Houghtailing told her son that Mr. Breckons would want something to drink. [269]

Q. What time in the conversation did Mrs. Hough-

(Testimony of Mrs. Lahapa De La Nux.)

tailing ask your husband or told your husband that Mr. Breckons wanted a drink?

A. After they had finished their conversation?

Q. Well, was this after you had been in the sick-room and had returned? A. Yes.

Q. And after that, during the time, you say you can't recall anything that was said, Mr. Breckons took at least two drinks?

A. Yes, that is what I remember.

Q. And who else drank and how many?

A. Mrs. Houghtailing.

Q. How many times?

A. I remember that she took one small glass.

Q. That is all you remember?

A. That is what I remember.

Q. Anybody else? Mrs. Richards.

Q. How many?

A. As I remember it, it was two.

Q. Anybody else? A. That is all.

Q. And you and George took nothing at any time?

A. No, I didn't see my husband drink.

Q. Can you say he didn't?

A. He is a man that drinks, but doesn't drink while he is working.

Q. I asked you at that time whether you can say he did take a drink or not? A. No.

The COURT.—What do you mean by that—no, you do not know or he did not?

A. George didn't take a drink. [270]

Q. Now, you have spoken about another conversation which you had at Aiea, your husband and Mrs.

(Testimony of Mrs. Lahapa De La Nux.)

Houghtailing, were present, in which Bathsheba's name was mentioned, when was that?

A. A great while afterwards.

Q. A year after or two years after?

A. About one or two months after.

Q. Then this was, this conversation was one or two months after the first conversation which you, or the other conversation I asked you about when Mr. Breckons and Judge Larnach were present?

A. Excuse me, I made a mistake; two weeks is right.

Q. Now, you say it is two weeks after?

A. Yes.

Q. It wasn't a year or two years? A. No.

Q. How long had Mrs. Houghtailing been at your house then?

A. After that talk with the lawyers, two weeks after that she came down to see us.

Q. And it was on that occasion?

A. After the two weeks then she left, then she came back again—she expressed her regards to George during that time the two weeks she came down—she came down on that two weeks, on that visit she expressed her regards.

Q. So that it was on a visit of two weeks after the Larnach and Breckons visit when Mrs. Houghtailing was down there that you say she expressed her regards, but she said she wanted George to take care of Henry?

A. That was a different time when she spoke about Henry.

(Testimony of Mrs. Lahapa De La Nux.)

Q. Well, did she speak about Bathsheba on this visit of two weeks after the Breckons-Larnach visit? [271]

A. Yes; she after this two weeks with Breckons came down and expressed her regards to her son, then she went back, then she came down again, then everything was straightened out with her son.

Q. I am asking you whether a certain conversation that you testified to, where you and your husband and Mrs. Houghtailing were present, where George said that he thought it was better that a thousand dollars be given or willed—to be given to Henry's children, or child, Bathsheba, when was that conversation?

A. That is the time she—when she came down to stop with us.

Q. Was that two months after or a year after or two years after, because she came to stop with you from the time of the visit, of the—after the incident where Mr. Breckons and Judge Larnach figured?

A. Three or four months after this second visit she came down and stopped with us.

Q. Do you mean by the second visit the one of two weeks after the Breckons visit?

A. Yes, after Breckons, she has explained.

Q. At that time she told George that she wanted Henry—him to take care of Henry and George said that he better give a thousand dollars to Bathsheba?

A. That is the time she called George and have a meeting and they sat down to straighten out all things.

Q. I did not ask you that.

The COURT.—What did she say?

(Testimony of Mrs. Lahapa De La Nux.)

A. She came down and said, "We can—we come to straighten this matter out. I want to take off Mr. Steere as guardian and leave everything to you as guardian." [272]

The COURT.—Go ahead.

A. "Because I now see that I am getting feeble. I want everything straightened out."

The COURT.—(Interpreting.) "And after everything was straightened out."

WITNESS.—"And after everything is straightened out all I ask of you is to look out for Henry," if George wanted to do so, that is the time George replied that his brother, knowing that his brother was a drunkard, he said, "If you want to do like that you better give it to Bathsheba"—that is the daughter of Henry—and she consented that that was a good idea. "Then after all these things are straightened out right then I will come and be with you. I want my boy and ourself and the other children—my boy George and yourself to come in on this property," didn't want Charley because he was bad.

The COURT.—No, "because his wife was a nigger."

INTERPRETER.—"Because his wife was a nigger."

The COURT.—You don't get that fully; she said, "After this is all straightened out then I will live with my son George and herself [meaning witness] and your children," and didn't want to do anything for Charley because Charley's wife was a nigger.

The COURT.—What did she *said* about Bath-

(Testimony of Mrs. Lahapa De La Nux.)

sheba—what did your husband say about Bathsheba?

A. No reason; she said it is because she knew that, speaking of Mrs. Houghtailing, that Henry was a drunkard.

The COURT.—(To Interpreter.) That is what George was saying?

INTERPRETER.—Yes.

The COURT.—Now, what did George say?

A. After all these things are straightened up George isn't [273] to forget Henry.

The COURT.—(Interpreting.) "You, George, don't forget Henry if you want to do so." Then George said, "I think it is the best thing if you can give a thousand dollars or something thereabouts or more to Bathsheba, the girl, Bathsheba."

The COURT.—Did he say why it should be done that way?

A. Yes; he said because Henry would not be able to take care of things; he would go around and be extravagant with it, spendthrift.

Q. Was anything said about the other children of Henry? A. No.

The COURT.—Did you think that was all right, that was a good proposition to yourself? A. Yes.

The COURT.—Didn't you think that it wasn't quite fair to leave the other grandchildren out?

A. I didn't understand about that.

Mr. WITHINGTON.—What was this affair that was going to be straightened out?

A. Wanted—Mrs. Houghtailing wanted to stop this suit.

(Testimony of Mrs. Lahapa De La Nux.)

Q. Do you know of anything that was done to stop it?

A. I don't know; all the reason I knew that she was wrong in this affair and she wanted to stop it.

Q. Do you know of any step she was going to take to stop it?

A. She left the property on my grandchildren and then on account of other people bothering her then she tried to stop it.

Q. The question asked, whether she knew of any step Mrs. Houghtailing took to stop the suit at that time? A. No, I do not.

Q. Did George suggest any step to be taken to stop the suit? A. No. [274]

That is all.

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Mrs. REBECCA HOUGHTAILING,

Petitioner,

vs.

GEORGE DE LA NUX and DANIEL DE LA NUX,

Respondents.

TRANSCRIPT.

Friday, June 20, 1919, 9 o'clock A. M.

Testimony of George De La Nux, for Respondents.

Direct examination of GEORGE DE LA NUX, called for respondents, sworn, testified as follows:

Mr. ANDREWS.—Your name is George F. De La Nux? A. Yes.

Q. You are the oldest son of Mrs. Houghtailing?

A. Yes.

Q. Where were you born, to the best of your knowledge, Mr. De La Nux?

A. I was told, over in Kauai, Hanalei.

Q. Who brought you up when you were a boy, a small boy?

A. Well, that is very hard question to answer, but I know most of the time I was with the St. Louis College.

Q. I mean as a young boy? [275]

A. Well, by my uncle, lived over in Hawaii.

Q. How old were you when you first knew who your mother was?

A. I think I was seven years old.

Q. Up to that time you had never seen your mother at all? A. Her? No, sir.

Q. Where was that when you first saw your mother? A. When I was at school.

Q. Now, then, after you got through school you graduated from St. Louis College? A. I did not.

Q. How long did you stay there?

(Testimony of George De La Nux.)

A. Until I was seventeen.

Q. Didn't graduate? A. No, I didn't.

Q. What class was you in?

A. Oh, it was the 8th grade.

Q. How many classes in that school?

A. Altogether different; I cannot say.

Q. Well, about that time?

A. Oh, there was only one more grade after that, but what that number was I don't know.

Q. Now, when were you taken away from school in the eight grade where did you go?

A. Over to Hawaii, Hamakua.

Q. Who did you live with there?

A. Paul Jarrett.

Q. Did you go to work?

A. Not right away; that is why I lived with Paul Jarrett, and sometimes with my uncle.

Q. When did you begin work—how old were you? [276]

A. Well, a few, maybe a month or so afterwards, something like that.

Q. A month or so afterwards you went to work; what was that? A. In the sugar-mill.

Q. What were—where was that? A. Paauhau.

Q. How long did you work on that plantation?

A. About four years and a half, I think

Q. Did you hold any other position than work in the sugar-mill?

A. Well, I was in there four years and a half, and I got up as far as sugar boiler, and besides that I done clerical work at the Landing there, and in the

(Testimony of George De La Nux.)

plantation office helping out the plantation bookkeeper.

Q. Now, then, after your four years and a half there what did you do next?

A. Then I went over to Pauillo.

Q. What position there? A. Night engineer.

Q. How long did you work there?

A. About two to six months, more or less, something like that. I could not give the exact—

Q. What did you do next?

A. Then from there I came to Honolulu.

Q. Now, where were you married?

A. In Honokaa.

Q. Married to this lady who has just been on the stand? A. Yes.

Q. You and she have lived together as husband and wife ever since? A. Yes. [277]

Q. When did you first see your mother after you remember her as a boy?

A. Well, I was twenty-one then and getting married.

Q. Where was it? A. In Honokaa.

Q. Did your mother go up there?

A. She came up there to see me get married.

Q. Do you remember what year that was?

A. 1899, I think it was.

Q. Now, when your mother came up there was there any conversation between you and her as to your future? A. There was.

Q. Tell us what she said.

(Testimony of George De La Nux.)

A. She wanted me to leave work up there and come to Honolulu with her.

Q. What were you to do down here?

A. Well, she said she had the means, maybe it wasn't those exact words, but she could, that is, she would take care of me, I didn't have to work, don't have to bother about work any more.

Q. What did you say to that?

A. Well, I didn't agree to it. I told her that I couldn't do that, because I was a workingman, and would keep on so.

Q. She went away, went back to Honolulu, did she?

A. After a short stay there, I don't know how long it was, but she came back again. I was still staying at Hawaii.

Q. And you stayed at Hawaii until when?

A. For about a year later, that is, I stayed there a year.

Q. Then where did you go?

A. Came to Honolulu then.

Q. With your wife? A. With my wife. [278]

Q. Where did you go in Honolulu and what did you do? A. I came to my mother's house.

Q. Stayed how long?

A. I think it was six weeks.

Q. Yes.

Q. In this six weeks I was there I found employment here in Honolulu at Catton Neil at the time it was at the corner of Alakea and I think King Street. I am not well acquainted with the street—Merchants Street.

(Testimony of George De La Nux.)

Q. You found employment—how long did you stay there?

A. About three weeks; then I was sent for, that is, I was asked to go out to the plantation.

Q. What plantation?

A. Honolulu plantation; they needed a sugar boiler there, and some of the boys I used to go with to school together with—

Q. Never mind; you had a chance to go there; did you take that position? A. I did.

Q. What—that was what date and year?

A. I could not tell you the day and—

Q. What month?

A. That was in 1901, November 25th, when I started to work there.

Q. And since that time where have you worked?

A. On the Honolulu plantation.

Q. All the time? A. All the time.

Q. Under how many managers?

A. Mr. Low, Mr. George Ross, former manager of Hakalau, and James Gibb, the present manager.

Q. What is your position now? [279]

A. Well, I am chief engineer of all the machinery, including the mill, that is, I mean chief engineer of the plantation-mill, pumps, pumping-plants, locomotives, steam-plows, tractors, and trucks, anything in the mechanical line.

Q. During the eighteen years you have worked there have you ever been laid off or discharged?

A. Never.

Q. And you have been promoted until you have

(Testimony of George De La Nux.)

reached the present position you have now?

A. I have.

Q. Now, after you came to Honolulu and went down to Aiea did you used to see your mother?

A. Very seldom.

Q. Why was that?

A. Well, take when I was in the mill I was working on night shift, then night foreman in the boiling-house, that is twelve long hours, and I only traveled—the only way to get into town was to hire a hack, and I could not lose all that sleep and go on night shift against for twelve hours; couldn't stand it.

Q. Did she come down to see you?

A. Sometimes.

Q. Now, did you and she have any conversations as to the disposal of her property, and when did they commence?

A. When I first came to her house, after a few days I stayed there she started to talk about property, she wanted to turn it over—all over to me; she said those things in the presence of my brothers, but I would never listen to it.

Q. Now, then, after that when was the next?

A. When I was down at the plantation she visited me on several occasions, and she made this same statement, but I never took any notice of it. [280]

Q. Now, when was your oldest son born?

A. In Aiea.

Q. Do you remember the year?

A. 1902 or 1903, if I am not mistaken. I am very poor on dates.

(Testimony of George De La Nux.)

Q. Where is he now? A. He is dead.

Q. After he was born was there any further conversation with your mother as to the question of her property? A. There was.

Q. Where was that? A. At my house in Aica.

Q. Just give us the gist of that, or any other conversation that took place as to the turning over of the property to you, when *you* child was first mentioned.

A. She used to say, as I have already stated, she wanted to turn this over to me, and I wouldn't accept it, giving no reasons why until later on, and she wanted then, she was—after me not accepting her wishes at all times, she wanted to turn it over to my son—yes, turn it over to my first son, then later on of course the boy was growing, and my wife was carrying another one. I asked her to wait until the other boy was born.

Q. Now, you say you didn't give her any reasons until later on; when was that when you gave her reasons, or argued with her?

A. Well, I did state to her, I think, maybe on one occasion, because she had come to me so often, you know, why I didn't accept the, her property, and I mentioned that I had two other brothers; I only know once speaking that way to her.

Q. Do you remember what she said in reply to that? [281]

A. She didn't care for that; they were not treating her right; they had been abusing her for quite awhile, and that I was the only son that was away all by

(Testimony of George De La Nux.)

myself trying to get along in the world, and from the way she spoke it looked as though she took more of a liking towards me than towards the other two boys.

Q. Now, at these times you used to see your mother was she drunk or sober?

A. Well, sometimes she was perfectly sober, sometimes she may come there with a drink or two, that I could not say, but perfectly sober at all times when she talked property affairs with me.

Q. Now, you have heard her statement and the statement of others that she was drinking all the time, or words to that effect, a common drunk; what have you to say as to that as far as your knowledge of her is concerned?

A. I cannot say—that I could not say for myself because I very seldom saw my mother in—until 1918—during the eighteen or nineteen years I was out there.

Q. Now, the times you did see her what do you know of her drinking?

A. Well, I can say this much, I have seen her take a drink, take two drinks, but as far as the drunk part *of* I always thought that she was a lady.

Q. Did you ever *see so* intoxicated that you could call her drunk? A. I have not.

Q. There has been a suggestion here—I don't know whether there has been any testimony—that you used to bring drink up to her house in Kalihi; is that true or not? A. It it not so. [282]

Q. Did you ever, to your remembrance, ever bring her any intoxicating liquor out to her house at all?

(Testimony of George De La Nux.)

A. I did not.

Q. As to your own family, are you a drinking man, Mr. De La Nux? A. I am not.

Q. How about your wife?

A. It is the same, she is not a drinking woman.

Q. Do you have liquor in your house or did you before prohibition?

A. Yes, I always keep it in the house, that is, sometime I don't have it, but always could get it in case of expected company around.

Q. Now, then, in other words, you are not what the Hawaiians call a missionary—you had liquor for friends?

A. I am not a missionary; I am not a drunkard.

The COURT.—You say you are not a drunkard; do you mean you don't drink at all?

A. Sometimes I may go along for three or four years; I have seen the time there where I hadn't touched a drop for seven years. I don't make a practice of it, but as I say, if some visitors come to the house or I go to a friend's house, I may take a glass of beer, something like that, just for the company part of it, that is all.

Mr. ANDREWS.—The same with your wife?

A. The same thing.

Q. Now, then, to get down, you suggested—the last thing you testified to, you suggested to your mother when she asked you about settling up this property matter, to wait until your wife gives birth to the second child; now after the second child was born did anything happen? [283]

(Testimony of George De La Nux.)

A. Yes, she kept coming at me again about this property, but giving it to me, she didn't say to give it to my two children, but to me personally, and I kept putting it off, that is, I would have nothing to do with it.

Q. Did she go into any details what she wanted to do, give you what arrangements you were to make for herself or anything like that?

A. Go into details of what she had?

Q. No, I will ask you, afterwards, did she state how she wanted this to be done, turning over all the property to her, what was she to get, or what was she to have—

The COURT.—To her?

Mr. ANDREWS.—To you, I mean.

WITNESS.—No.

Q. Tell us what she suggested—what her suggestion was, what she wanted to do.

A. The only thing she said to me, she wanted to turn all her property over to me. How it was to be done, I don't know, I never asked, because I never was posted about land matters, or land affairs.

Q. Did you know at that time or at any time the amount of her property?

A. I did not. I do not until this day,

Q. She never told you? A. Never.

Q. You never investigated?

A. I never asked her, and I never investigated.

Q. Right up until this testimony was given here?

A. Never, right up until this testimony was given here in this court.

(Testimony of George De La Nux.)

Q. Now, then, Mr. De La Nux, we got as far as she asking you to [284] take over the property, and your two children were born, what happened after that?

A. Well, I don't know. I felt this way, I didn't know what she had, and I didn't care to know, and I didn't want to, because I was getting along in this world by myself, I wasn't waiting to get something from anybody, get anything from anybody, except working for it, so one time when she came down, I said, "If you want to do anything like that you can give it to my two children, if you think that is all right; that is up to you, you can give it to my two children as far as I am concerned, but as far as I am concerned, I don't want it."

Q. What happened after that?

A. Well, she left, and a few days after that last conversation, if I remember right now, she left and she came down again, and asked me to come up to Honolulu with her and have the thing made out. I had kept putting it off, putting it off, putting it off, I did not know what she had; I wasn't going to be bothered with it. Well, I knew at the time that she had this home, that is all I knew she had, was this home in Kalihi, because I went to live with her there for a few weeks, outside of that I didn't know nothing, so with this coaxing continually, coaxing, I did come up with her, my wife and me, and we went to Correa's office.

Q. Did you know Correa at that time?

A. Never saw him in my life.

(Testimony of George De La Nux.)

Q. Had you been consulting with him about this deed or any other property?

A. I was a perfect stranger to this gentleman, didn't know absolutely where to go.

Q. Who did you go to this office with?

A. My mother. [285]

A. My mother.

Q. Who went with you? A. My wife.

Q. And your mother—

A. My mother took me to Correa's office.

Q. Then you come to Correa's office, what happened there?

A. Well, there was a conversation there, and she wanted to give all her property over to me, over to my two sons, and Correa came out with a paper and read it to my mother.

Q. Was the paper made before you came there?

A. Oh, yes, because we were only there a few minutes when we walked out again.

Q. (Mr. ANDREWS.) Handing you Plaintiff's Exhibit "F," is that the paper that Correa?

A. I guess that is the one; I didn't know of any other one.

Q. When Correa brought this paper out what was done with it? A. He read it to my mother.

Q. What was said after that, or done?

A. After he read it he asked her if that is all right, and she said yes. I don't think we were there more than five or six minutes to my knowledge, and he then directed us to go to William Savidge's. I don't know where it was, and he pointed it out across the street

(Testimony of George De La Nux.)

opposite the bank, and my mother and I *we* went together.

Q. And did you see your mother sign this?

A. I did.

Q. Did you see Savidge sign it? A. I did.

Q. Who was it given to when Savidge had signed it, put his seal on it, did she keep it, or to you?

A. She gave it to me. [286]

Q. I call your attention to the fact that the original body of the deed recites the date as the tenth day of July, and the acknowledgment is the eighth day of November, both in the year 1905; did you go there more than once? A. Once.

Q. The day that Mr. Savidge put his seal on it?

A. That is the only time.

Q. That is the date she signed it? A. The day.

Q. Six months before it was drawn; can you explain that? A. No.

Q. You don't know anything about it?

A. I don't know anything about it.

Q. Now, then, when this was given to you was anythink said about recording it? A. Yes.

Q. Tell us.

A. When we walked out of William Savidge's office there we stopped a little ways on the street there towards the Ewa side, and she asked me, or she wanted me to promise her one thing, and I said, "What is that?" "Not to let anybody, not to let anyone know about this." And again I asked her why, and she said that she was afraid of Mark Robinson, if he found out he might make trouble for

(Testimony of George De La Nux.)

her or she could not get any money from him, and I said I would do that. I promised her to keep the thing quiet. She said furthermore, that is, to keep the thing quiet until after her death. Being ignorant of these things I said that was all right and keep my word.

Q. When did you record it—you did record it finally?

A. Yes; we were living down at Halawa then, I mean this particular time at Halawa she came down there on three or [287] four occasions, and on two occasions when she came down there the boy Georgie, of course, when he saw the grandmother he was quite —he was quite a boy then, about five or six years old, something like that, and very shy, and he used to run away from his grandmother, and of course his grandmother did like that. On another occasion when she came down it was the same thing; maybe on those other times for all I know; anyway she came to me and said she wanted to change the property or thing over to my smaller boy, and I asked her why. "Well," she said, "every time I come around to see you people this son of yours always runs away; I don't like it." She fancied the smaller boy more that is living to-day, she wanted me to agree to have that thing changed over to the smaller boy, but I could not see it that way. She says that she was going to have it changed, that is all; she says, "I have been to a lawyer in town," and said that she could have it changed, and I said, "You can go ahead and do so." The very next morning the chief engineer

(Testimony of George De La Nux.)

of the pumping station, he came around, and I took this paper to him to have him look it over, and I asked him if that is all right, and he said, "No, you better go right up and have it registered." Then I came up got on the train, and came to Honolulu, and had the paper registered.

Q. What have you to say, was there anything specially said, about—she has testified that she only wanted to give you only the Kalihi property?

A. Nothing like that was ever mentioned to me, never; it is, "her property."

The COURT.—When was the younger boy born, Daniel?

A. In—somewhere between 1903 and 1904; I think it was in 1904; he is going on sixteen now; his last birthday was [288] on April fifteenth, and he was fifteen.

Q. Born April 15, 1904?

A. Yes, I was down at Waimalo then on this pump.

Mr. ANDREWS.—Now, then, after you had this recorded, things kept on the same between your mother and you, she visits you and you visit her?

Mr. WITHINGTON.—I object to that as leading.

Question withdrawn.

Q. Now, during all this time, after the signing of the deed, what can you say as to your mother visiting you or you visiting her from 1905?

A. I don't quite get that.

Q. From 1905 when this deed was signed before William Savidge, acknowledged before Mr. Savidge,

(Testimony of George De La Nux.)

after that did your mother continue to visit you and you visit her? A. Yes.

Q. And did that continue right up till the bringing of this suit?

A. Well, now and again but—

Q. Did you visit her at different times in her house at Kalihi? A. Very seldom.

Q. At any of these times did you ever find her when you visited her, or when she visited you, in 1905, intoxicated? A. I did not.

Q. Now, when your mother stayed at your house did your mother stop, stay at your house for a week, or three or four days, or how long a time, for a long time? A. Yes.

Q. Now, at any of these times did she ever use, indulge in liquor to excess?

A. Not in my house, because I wouldn't allow it. [289]

Q. Did she try to? A. No.

Q. Tell us what you know of her drinking at your house, tell us just about what she used to do.

A. Before meals she will have a drink.

Q. Anything else?

A. Do you mean as to her drinking?

Q. Yes. Was there any time she didn't drink at all, or all the time?

A. She didn't drink all the time; she takes a drink before meal; sometimes when company is there she will be in with the company.

Q. And the drink which she had was the drink which you always kept for company and for visitors?

(Testimony of George De La Nux.)

A. Yes.

Q. Now, then, when was the—what was the first time you knew that there was any trouble about that deed that you claim—the claim that she didn't know that she had signed that deed to your children?

A. I think Breckons wrote me a letter.

Q. Was that before he visited you and Mr. Larnach? A. Before he visited me.

Q. How long before, do you remember?

A. Maybe fifteen—do you mean before? Might have been a year or so, I could not say.

Q. You do not remember, a year or so before he visited you? A. No.

Q. Was anything said or done after that, after he wrote you that letter?

A. No, the thing died away, there was no more, never a word, no more about it until quite awhile after, until the trial of this suit; that is all I know. [290]

Q. What happened quite awhile after he wrote you that letter—anything?

A. Mr. Breckons, Mr. Larnach and my mother, May Ann Richards, and my brother Charles' wife—I don't know her name—they all—

Q. They all came down to your house at Aiea?

A. They did.

Q. When did they get there, in the evening, day time or when?

(Recess.)

Question repeated.

(Testimony of George De La Nux.)

Mr. ANDREWS.—When did they come to your house? A. In the afternoon.

Q. You were working? A. Yes.

Q. Your wife sent for you and you came there?

A. Yes.

Q. When you got there what happened—tell us the gist of what you remember.

A. We started to talk about this deed affair.

Q. Who started it?

A. I think it was Mr. Breckons.

A. All right; do you remember what he said?

A. He started to tell me that my mother's intentions were only to give the Kalihi home to your children; that is the words he used.

Q. What did you say?

A. I think that I said that she gave all her property to my children, and of course there was a little talk back and forth that she never intended to do that, "Yes," I said, "I had nothing to do with it; it was my mother's own doings." The conversation was very short, and he then started to [291] tell me about what was to be done—that is, what my mother wanted to have done.

Q. What was said?

A. To give the Kalihi home to me, to my two children, and divide up the rest of the property amongst the boys. That is the meaning, I think, myself and my two brothers, and I didn't agree to anything like that.

Q. Was there anything else said?

A. Well, then I started to ask my mother ques-

(Testimony of George De La Nux.)

tions, only three questions, I think, I asked her. The first question was, "Did you make out the papers the way that she did," and she started to cry, and I says, "Now, Mother, you came here for business purposes, and not to cry," I says, "Brace up," and I got off my chair and went over to her to humor her along, that is, not to cry, and I went and sat down again, and she braced up, she says, "Well, you know, Sonny, I am Mama, is something like that, is a drinking woman, and I didn't intend to give you everything; it was only the home," so I came with the second question, asked her if I had forced her, and if I was the one that had her make the papers out, and the third question—

Q. What did she say?

A. She didn't answer; the third question, I says, "Ain't it so, the way your two sons have been treating you all these years, that you made out the paper the way you did, the way it is to-day?" I followed that right up, "Ain't it so, they used to call you a son-of-a-bitch, call you a bastard, used to call you a whore?" I says, "Ain't that the reason you made that paper out to, the way it is to-day?" and I got worked up while I was saying those few words. Excuse me, excuse my language, your Honor. That is the way it ends up. [292]

Q. What did she say to that?

A. She said, "Yes," and I said,—no, I said before, excuse me, before this, these questions were asked; I asked my mother to tell the truth in the presence of the lawyers who were in the house, I wanted her to tell the truth, and she did.

(Testimony of George De La Nux.)

Q. All right; after she said yes to that, what happened?

A. Nothing much more was said about the deed—in fact, I don't remember anything more about it. When we stopped talking about she asked me if I had anything to drink in the house, for me to get some for Mr. Breckons, and I went in and got it. I think the bottle was a little below half full.

Q. Bottle of what? A. Gin.

Q. Ordinary, square-face gin?

A. Yes; I brought the bottle in with, I think, four glasses on it. I didn't know Mr. Larnach didn't drink, but I brought, I think, it was four glasses with water and the gin and sat it on the table and they helped themselves.

Q. Now, who helped themselves, who drank?

A. The only parties I saw drinking was my mother and Breckons. I do not remember anyone—

Q. Had your mother had any drink at your house before that that evening or that day?

A. I did not see because I brought the gin in myself.

Q. Before that was any gin drank? A. No.

Q. Was she intoxicated at that time?

A. I don't think so. I never noticed anything wrong with her; she was perfectly sensible; knew what she was talking about.

Q. What about the drinks that she took—did she take more than [293] one drink afterwards?

A. I think she only took two glasses; the glasses were very small.

(Testimony of George De La Nux.)

Q. Did you see Mr. Breckons drink the rest?

A. No; he took, I think, it was three.

Q. Was he the only other one that was drinking?

A. Yes.

Q. You didn't drink or your wife didn't drink?

A. No, sir.

Q. Now, then, did they all get up and go away?

A. Yes, shortly after that they all started for home.

Q. You do not remember anything else that was said about it, about the deed? A. No, sir.

Q. Didn't say anything of what they were going to do, anything like that? A. No, sir.

Q. After that did you see your mother—how soon after that did you see your mother?

A. I think it was a couple of weeks after.

Q. How did you come to see her that time, where was it?

A. In my house, she visited me.

Q. Now, was anything said between you and your mother at that time when she came to visit you?

A. About the deed?

Q. Yes, all—at all times.

A. Yes, all times she visits me she speaks of, about her property.

Q. Well, at those times did she explain anything or say anything of why she came down with Breckons and Larnach, or anything? [294]

A. Yes, she said she wanted me to look after her affairs or be her guardian, not exactly that word, guardian—

(Testimony of George De La Nux.)

Mr. WITHINGTON.—Was this two weeks afterwards?

Mr. ANDREWS.—Two weeks afterwards, was it?

WITNESS.—Yes.

Mr. ANDREWS.—This was the conversation two weeks afterwards, I will ask you—withdraw that question. Now, after the visit of two weeks after, how long did she stay at that time?

A. I think she only stayed a few days, to the best of my recollection.

Q. All right; then where did she go?

A. She went back to Kalihi, I suppose.

Q. All right; now after that, did she again visit you? A. She did.

Q. When, how long afterwards, about, can you remember—give us your best. A. I cannot give—

Q. At that time, three or four months after, a year after. Give us the best of your remembrance.

A. I think she came down two weeks after the visit by her attorneys and said she wanted—well, after staying there a few days. I don't quite remember exactly what took place, I mean, how that happened, but she came down there and talked to me about Mr. Steere.

Q. That was the visit two weeks after that she talked about Mr. Steere, was it?

A. I cannot say positively—well, yes, I think so.

Q. It was during those two or three days?

A. Yes, she sat with me, and she called me and my wife to come into the parlor and said she wanted to talk to me, it was after supper, and I asked her what

(Testimony of George De La Nux.)

it was, and she [295] said, she spoke about Mr. Steere,—I didn't know Mr. Steere, I didn't know who Mr. Steere was, and I asked her who he was, and she said Steere had been appointed her guardian by the Court and she could not get any money from him, and she wasn't, that is, she wasn't getting enough money, and wanted to know if I could not help her out, and I said I would try.

Q. All right; what else, if anything?

A. Then a day or so went by, at the table we were having—well, we were having our meals, she got talking to me about this same affair, but I wouldn't give her any answer one way or another—that is, what I would do, or could do, or anything at all.

Q. What do you mean, this same affair?

A. It is about Steere affair, remove him as her guardian, and for me to help her out, and I said, "Now, look here, Mother, I ain't going to give you any answer one way or the other, because some day you may say or tell someone that I was the one that urged you to do whatever might be done," I says, "Now, I ain't going to give you a chance, Mother. I am going to have nothing to say about it whatever. Whatever you say I will try to do for you." And I repeated the thing over the second time, "I ain't going to give you a chance to say anything, that I was the one that asked you to do it." Then she says, "Well, Sonny, if we do it this way we go up to Honolulu and have a paper made out." I think she mentioned Judge Whitney, about having a paper made out turning the thing over to you—no, I got that

(Testimony of George De La Nux.)

wrong, that comes later on—she asked me to write a letter to Breckons; that was it, this other matter came later on—she asked me to write a letter to Breckons, and I sat there at the dining-room table there and wrote [296] out, I don't know just what the thing is to-day, but—

Q. Wanted you to write a letter to Breckons—what about?

A. I gave it to her to make a copy of it.

Q. Did she tell you what she wanted to write to Breckons about?

A. Yes; because they had charged her five hundred dollars for the first, that is for the beginning of the case, and nothing was done, she was very much put out about the charge that they had made against her—that is, she had to pay five hundred dollars before they could go ahead with the case.

Mr. ANDREWS.—I hand you this letter; this is dated—is this the Breckons letter?

A. (Hands witness letter.) Well, I didn't write this one, but I wrote—

Q. This is dated April 3, 1917.

A. Oh, yes, that is what I was talking about a little while ago, came later on.

Q. That is, some months after they came down to see you in 1916, isn't it? A. Yes.

Q. Now, you remember—let me hand you the power of attorney, signed before Judge Whitney, that is February, 1917?

A. This, yes; this was all later.

(Testimony of George De La Nux.)

Q. This was before the letter, two months and a half?

A. Yes, that is right, that is right.

Q. Now, which came first, when did—do you remember when she came down to live, you say, for two or three months?

A. That is when she took sick.

Q. When was that—have you any idea of that date? A. I have not. [297]

Q. Was this Whitney—this power of attorney, when she was with you sick, when was it when she came down, as you say, two weeks after this conversation with Larnach and Breckons?

A. She wasn't sick.

Q. Was this before she was sick?

A. This was before she was sick.

Q. Sure of that? A. Sure of that now.

Q. Now, *was,* then, was this the time that you are speaking about a conversation some weeks after Mr. Larnach and Mr. Breckons came there?

A. Was that—what is that, again?

Q. When was this conversation about going to Judge Whitney about removing Steere—was this during the weeks, the conversation you had about two weeks after the visit or was that another time, still?

A. That I could not state. I could not state the date or when it took place.

Q. Now, this conversation—was there any conversation before you went to Judge Whitney's office?

A. Yes.

Q. She spoke about—

(Testimony of George De La Nux.)

A. She spoke about it herself.

Q. Now, what was the result of that, after she had spoken about it, what did you do, or she did?

A. Well, then I agreed to it just to help her out.

Q. You agreed to what, in what way—what did you do?

A. Nothing. I said, "All right, I will go along with you."

Q. Did you go with her?

A. Yes, we got into the machine and we came up to Honolulu here, we stopped off, I think, outside here (indicating outside this building.) [298]

Q. All right; what happened then?

A. Then she took me to Judge Whitney's office.

Q. Had you ever seen Judge Whitney before?

A. Never; didn't know the man.

Q. What happened when you got to Judge Whitney's office?

A. She took me over to the office, that is the thing, the first thing, took me to Judge Whitney's office, when she took me in there, we went in there; she started to talk to Judge Whitney, and explained what she wanted to have done. I was sitting a little ways back in another chair; after their conversation was all over, and one thing I took particular notice of, she said to Judge Whitney that she wanted, that is, she wanted—"I want my oldest son George, my oldest son to"—I cannot give the exact words, but to represent her, to be her agent, that is, to give me the power of attorney to act for her.

Q. What did Judge Whitney do, if anything?

(Testimony of George De La Nux.)

A. Well, I know then, I saw him go to the typewriter there and write out something after—thought it was this paper here.

Q. Did she sign it for him? A. She did.

Q. Did you say anything to Judge Whitney at all?

A. No, had nothing to say; none of my business.

Q. Now, then, this letter to Mr. Breckons, is about the month, about a month and a half after that, dated the third of April, 1917; how did that come to be written, if you remember?

A. I remember the letter, that is, making it out, writing it out for her to copy.

Q. What about this (Defendant's Exhibit No. 1)?

A. Well, as close as I can make out, this letter was written or she was sick, she came down to my house; she was sick [299] at the time, very sick, and she had then told me that she was—she had enough of those people, that she didn't want anything more to do with her lawyers—well, in fact, the whole lot of them, that she was through with them, and I never gave no answer one way or the other, I was playing safe. After a few days, afterwards she kept talking about the lawyers again, that is, about these matters, that is, about Steere and Breckons and Mr. Larnach and the rest, they had urged her to bring suit against me, that she didn't want to go ahead any more with it, and then I says, "Well, it is up to you, whatever you want done, I ain't going to suggest anything," then I says, "At your request I will write *our* a little letter and you can read it over; if you think it is all right you can do the writing yourself."

(Testimony of George De La Nux.)

Q. What did she do?

A. That is how this letter came about.

Q. Was she intoxicated at the time or drinking any liquor at all?

A. She was too sick to take any drink; never accept any, all the time that she was a sick woman in my house.

Q. Was she taking any liquor at all?

A. None at all.

Q. Now, then, about the—about a month after that, the 24th or 22d of May, suit was brought against her (you) by you (her), was she living at your house then—you remember when the papers were served on you, you remember that they were served on you?

A. Yes.

Q. Had she gone away then? A. Yes.

Q. Now, your wife has testified to a conversation in which [300] Mrs. Houghtailing said that she wanted to speak to her (Mrs. De La Nux) to her son, then she called to you and you and your wife into the parlor and you three had a conversation which your wife has testified to: do you remember any such conversation? A. I do.

Q. Now, when was that—do you remember which visit? A. I could not state.

Q. You could not state whether it was the time shortly after the visit of Larnach and Breckons, or whether it was the time when she came down sick with you or some other visit?

A. Repeat that question.

Q. Do you remember what time she had this con-

(Testimony of George De La Nux.)

versation with you, the time she stayed with you because she was sick, or the time when she was, just after the Breckons-Larnach visit, or what time—do you remember? If you don't, say so, if you do, tell us. A. That I could not say.

Q. You have had a paralytic stroke, haven't you, Mr. De La Nux? A. Yes.

Q. How long ago? A. Since 1914.

Q. Since that time have you had a little trouble with your head?

A. Oh, right along; have to be treated by the doctor right along.

Q. Now, do you remember, can you tell us what happened at *a* that conversation that your wife has told us, do you remember what the words were, said, at that conversation?

A. Well, we started to talk over this matter and she said [301] that she did not want to see Charley, my brother Charley, I *don't whether*—anyhow she didn't want to see his wife get any because she was a nigger. Those are the exact words she used, but the other words before that I can't recall it now.

Q. Did she say anything about Henry?

A. Henry? Yes, she was—she liked Henry, and in all of her visits to me at all times she always spoke well of Henry.

Q. Now, your wife has said something about, that she wanted you to take care of Henry after she died?

Mr. WITHINGTON.—I think the witness ought to be questions, not to give conclusions.

(Testimony of George De La Nux.)

The COURT.—Objection sustained.

Mr. ANDREWS.—Was anything said about Henry, if she said anything, can you remember, in that conversation?

A. Yes, she spoke about Henry.

Q. All right.

A. Yes, she asked me to promise her after everything was all made up, all right, that is, in my favor, if I would promise her that I would remember her son, my brother Henry, and I said, "What is it?" and she said she liked Henry. As soon as she said that, I said, "All right; what would you want—what would you like to have done?" and she said, she wished that I would take care of him, and I said, "Well, being that you like Henry"—no, she wanted me to help out Henry, and I said, "Well, in what way?" well, she said, she didn't say in what way, and I said, "Well, then, why do you want to give Henry anything—what do you want to give Henry?" I said, "Why give him anything?" because, I took the stand, that is the way everything was going to be all right; there would be nothing left except money, so I says to her, "If you want to do anything for Henry," [302] I says, "you better give it to his daughter, and because Henry—you know Henry is a drinking man, he will only spend it," I says, "whatever you say the thing, what, whether it is a thousand dollars or more, it is up to you"—this was only a suggestion on my part at that time when I said that, a thousand dollars or whatever it may be, place it into the hands of someone that will take care of it

(Testimony of George De La Nux.)

for her until she is of age. And she thought that was a very good idea.

Q. For whom?

A. For this Bathsheba; at the time I was only speaking of Bathsheba—why I only thought of her this way because I had altogether forgotten my other brother's children, because this Bathsheba I used to see her more frequently than the others. I don't know, and didn't know where they are, naturally I spoke of Bathsheba only.

Q. That was all that was said?

A. That was all that was said.

Q. That is all you remember?

A. Yes, that is all.

The COURT.—Did Charley have any children at that time?

A. Yes.

Q. You knew that he had children?

A. Yes; how many I didn't know.

Q. How many children has he got now—Charley?

A. I don't know who his children—how many, I don't know.

Q. How many children did Henry have at that time?

A. Maybe—well, I only know of three children.

Mr. ANDREWS.—That is all. Oh, one more question.

Q. Did you at any time urge your mother to deed to you or to your sons either the Kalihi property or all her property [303] or anything?

A. Never once in my life.

(Testimony of George De La Nux.)

Q. Did you ever make any arrangement for her either to go to Judge Whitney or Correa or any of these other lawyers to have these papers signed?

A. I never did.

Q. Did you suggest writing this letter to Breckons A. I did that; yes.

Q. How did you come to do that?

A. Well, she was—she could not—she told me she could not get enough money to take care of herself; she had paid out lots of money and got nothing in return for it, and she was absolutely tired of them and had asked me three or four different times in my house there to help her along; of course I didn't know which way to go about it, finally I thought of this letter proposition, and I wrote it out and gave it to her to read, and asked her if it was all right and she said yes.

Mr. ANDREWS.—That is all.

Cross-examination.

The COURT.—Have you and Henry been on good terms right along?

A. Yes; we have never had any fights with none of my brothers.

Q. Been on good terms right along with those boys?

A. I can't say good terms. I see Henry more than Charles; never had no rows or fights or anything.

Q. No fights at all?

A. Not at all, none whatsoever; there was no occasion for it. I see Henry; I come into town some-

(Testimony of George De La Nux.)

times, and on going to [304] the iron works through business for the plantation, I see him, meet him in the road—very friendly, not to speak to at all times when I did see him.

Q. But you don't bear him any hatred or ill-will, do you?

A. I do not, never once had a bad word for any of my brothers, never said—never spoke to anybody about my brothers.

Q. When your mother spoke about remembering Henry you felt it wasn't a wise thing to do to give him anything on account of being a drunkard?

A. Yes.

Q. Why didn't you suggest that the money be given to somebody to keep for Henry—let Henry have the income?

A. I didn't have that idea at that time or even up till now. I only had this one idea, that is, I thought it was the proper thing to do, to give it to his oldest daughter.

Q. At the time you knew the daughter was too young to take the money herself, so you suggested it to be given to somebody else to hold for her?

A. Take care of whatever she was willing to give her until she came of age; and I further stated that she did not have to know anything about it until she was of age.

Q. You did not think about the other grandchildren, only thought of this Bathsheba and your own?

A. No, it is this way. I hadn't seen the other children for years, never come to my memory, that is,

(Testimony of George De La Nux.)

never gave me a thought about those. I saw Bathsheba more than the others and naturally lost track of the other children, and my mother never asked why not see that some of the other children—never gave it a thought.

Q. Do you remember way back in 1905 when she wanted to [305] give the property and you said you didn't want the property yourself, you told her there were two other brothers?

A. Yes, that same statement, those same things were put to me away back in 1901 when I first came from Hawaii, and I told her the same thing, told her right along up until I had two boys of my own.

Q. Up to that time she had no use for Henry?

A. Well, she had no use, at times, I guess, but she always spoke about giving me everything because my other brothers didn't treat her right.

Q. At that time? A. At that time.

Q. But back in 1917 you said that she thought a whole lot of Henry?

A. Yes; she told me that in my own house, told me to promise not to forget "your brother Henry," but she didn't say what it was, property or land or money or anything, and I offered this other suggestion because of him being a drunkard, to give whatever it might be to his daughter, I had forgotten, absolutely had forgotten about the rest of the children.

Q. Was Henry a drinking man way back in 1905?

A. I guess he was.

Q. At the time you wanted your mother to divide the property between all the boys, in 1905?

(Testimony of George De La Nux.)

A. I always said that up till the time—well, it is this way, your Honor, even after the deed was made, she kept talking to me about the property all the time, but the thing was made out and I had no more to say about it; before that she would talk about the property, and I would tell her that I had other brothers, [306]

The COURT.—Up to what time?

A. Well, that would be up till the time the deed was made.

Q. Up to 1905 the time the deed was made you wanted her to divide all the property between all the others?

A. Yes, I wanted her to divide all the property between my brothers and myself.

Q. In 1917 when she spoke about Henry you said, "No, give it to Henry's daughter, Bathsheba?"

A. Yes, but there was no mention about property, nothing said, whether it was property or money whatever it might be, whatever it might have been.

Cross-examination.

Mr. WITHINGTON.—I understood you to say that you first saw your mother when you were married, since you were a boy?

A. No; when I first saw my mother was seven years of age, going to school.

Q. Did you say that you first saw your—when you were married that was the first you had seen your mother since you were a boy? A. Yes.

Q. When was it that you first saw her—when you were a boy?

(Testimony of George De La Nux.)

A. Well, the best of my recollection, I was about seven, six or seven years old, something like that, she brought me some clothes.

Q. How long did you continue to see her at that time? A. Only saw her once in twenty years.

Q. What year did you say you were born?

A. 18— I am going on what was told me by my uncle; may not know it correctly.

Q. You have been told when you were born? [307] A. 1866.

Q. How old are you?

A. Forty-three, according to my uncle. It was 1876.

Q. What year were you married?

A. In 1900—no, 1899.

Q. So up to that time you had never seen your mother but once?

A. That is the best of my recollection.

Q. And when she came to your marriage then she asked you to come to Honolulu and she would take care of you? A. Yes.

Q. But you said you were working? A. Yes.

Q. When you did not come to Honolulu you did go there to live, did you not? A. I did.

Q. After a while you got this job at Catton Neils, and after another little while you went to Aiea?

A. Yes.

Q. And since you have been there continuously on that plantation? A. Yes, sir.

Q. I understand you have seen your mother rather seldom since then?

(Testimony of George De La Nux.)

A. Very seldom since I have been on the plantation.

Q. Now, when you—when did you first hear about any deed to your two children?

A. Do you mean about the suit or the deed made to my two children?

Q. Of the deed being made to your two children?

A. That was several years after the last, the second born child. [308]

Q. Born April 15, 1904? A. Yes.

Q. So the first conversation you had in regard to the deed with anybody in regard to the deed to the two children was some time in the summer of 1904, that is correct, isn't it?

Mr. ANDREWS.—I don't understand that he said that on the first conversation.

Mr. WITHINGTON.—I only want to know when the first—

The COURT.—In direct examination he spoke about making the papers to the two children, and they were expecting another one.

Mr. WITHINGTON.—I am asking when the first—perhaps I put it the other way. You testified that you suggested to your mother of waiting until this second child was born; that is correct, wasn't it?

A. Yes.

Q. That was before the birth of that child?

A. Yes.

Q. When next was there any reference made to a deed to the two children, any conversation about it?

A. I will state it this way, about the children,

(Testimony of George De La Nux.)

making a deed of the property over to my two children.

Q. I don't want you to restate; I want you to give the time.

A. Well, got to do it—

Q. I want you to answer my question; you testified on direct examination to this conversation in which you suggested waiting until the second child was born. I want to know when there was next any conversation in regard to this deed.

A. There was no other conversation mentioned about the deed only up till the time, that is, several months after when my mother came down to see me at Waimalo and asked [309] me to come up to Honolulu to have the thing made up right away; she didn't want to wait any longer.

Q. That is the time when you did come up?

A. Yes, when I did come up; I didn't know anything about the deed, no mention about the deed.

Q. I am asking you merely with reference to the time, Mr. De La Nux. Please confine yourself to my question; then the next reference to the deed was when your mother came down to Waimalo and said that she wanted to have the deed made and you and she and your wife went up to Correa's office; that is correct, is it? A. Yes.

Q. Now, what do you mean that it was several months after the birth of your child?

A. Because after the boy was born she visited there, only stayed a few days, go away again, came back again, stayed a few days, go back again, then

(Testimony of George De La Nux.)

come back again and stay a few days, keep on like that for several months, that I couldn't state the years or the day or the time, only what is shown here on the paper, but I know the day when she came down there the last time and asked me to come down with her to Honolulu.

Q. Now, was there any—no reference made until this day when she asked you to come to Honolulu and the deed was acknowledged, was there no reference at any of these times she came down for the execution of the deed?

A. I didn't know nothing about it, the only day we came together was at Correa's office.

Q. I am asking you whether she ever referred to it at any of those times down at your house?

A. No.

Q. Didn't refer to it? [310] A. No.

Q. So that you knew nothing about it until she asked you to go up to Correa's office?

A. Absolutely nothing.

Q. What did she say at that time?

A. She came down and told me, "Now," she says, "I want you to come up to Honolulu and have things made out, and I don't want to delay any longer," and I said, "All right." What was done before that, or if there was anything, I know nothing about it, because she mentioned nothing; we came up, we got on the train and came up to Honolulu and she took me to this office of Correa.

Q. She said to you then, "I want you to come up to Honolulu and have things made up"?

(Testimony of George De La Nux.)

A. Yes, she wanted to fix up her things, in other words.

Q. Did she say "things made out"?

A. That is a good many years ago. I can't remember the exact words she said.

Q. Is it what you just said now?

A. I said "deed," but I don't remember whether those are the exact words she said; in other words, she wanted me to go up with her to have things straightened out, made out.

Q. She wanted to have these things made out, straightened out?

A. She wanted to turn everything over to me, to my two sons.

Q. I understood that, but I am referring to her exact language; as near as you can recollect at that time, when did you first hear of Correa's name?

A. When we went to his office.

Q. Before that she hadn't mentioned Correa?

A. No.

Q. As far as you now can recollect she didn't say a word [311] excepting—didn't say anything about the deed except what you have testified?

A. Well, because I was ignorant of those things at that time.

Q. When did you become otherwise than ignorant, when did you become wiser than you were at that time about this deed?

A. Well, when the thing was filed in court here.

Q. Then you ceased to be ignorant?

A. I said I was ignorant of that particular thing.

(Testimony of George De La Nux.)

Q. Now, had you at any time said anything to your mother about her promise to make out a deed to the two,—to the child who was born and the unborn child, previous to this time when she came down to Waimalo, had you reminded her of her promise at any time?

A. Reminded her of her promise?

Q. Yes.

A. What promise?

Q. She said she wanted to make out a deed to you —that is before 1905?

A. The deed wasn't mentioned, the property.

Q. Wanted to make over the property to you?

A. Yes.

Q. And you suggested making it over to your children; is that right?

A. Not in the first beginning, no.

Q. You suggested making it out to all three of them; is that correct? A. Yes.

Q. Then she objected to that, to them, said she wanted to make it out to you, and you suggested making it out to your children?

A. No; that was later. [312]

Q. I mean later? A. All right then.

Q. Later you suggested making it out to your children? A. Yes.

Q. Suggested that as there was a child to be born you wanted her to wait? A. Yes.

Q. Now, did you ever call her attention to that at any time, to that conversation? A. I did not.

Q. You did not? A. I did not.

(Testimony of George De La Nux.)

Q. So that nothing was ever said from the time of that conversation which was before the birth of your second child until November, 1905, when you went to Correa's office and had the deed acknowledged, no reference to it? A. No, not all.

Q. None whatever,—were you "playing safe"?

A. Not playing safe.

Q. What did you mean in the course of your direct examination—

A. Yes, I said, playing safe, in my house in Aiea, yes, certainly.

Q. What do you mean by that expression, playing safe?

A. I wasn't going to have any come-back. I wasn't going to have her testify that I urged her, forced her.

Q. I am asking you if you were playing safe this earlier time *when* you, in the same way?

A. This thing, playing safe, only heard that word in the last five years.

Q. I understand that; you don't have to hear a thing to do a thing. [313]

Q. In the earlier time between the conversation about waiting for the birth of the child and up to November, 1905, when you didn't refer—when you didn't call it to the attention of your mother, you were playing safe, waiting for her to bring it up?

A. No.

Q. You were playing safe later?

A. That is, this last year or two.

Q. Now, you say that you never had no—never knew anything about the amount of her property?

(Testimony of George De La Nux.)

Q. I do not.

Q. You knew she was getting money from Mark Robinson?

A. *I* this way; I have been there with her a couple of time; that is all I know about it.

Q. You have been there with her?

A. A couple of time; yes.

Q. When she was getting money? A. Yes.

Q. Did you know that she owed Mark Robinson considerable sum of money?

A. No, until I heard it in court the other day.

Q. Never suspected?

A. No, because I never knew what she had, what she was doing with it.

Q. What made you think, what did you think was her motive in concealing it from Mark Robinson?

A. What is that?

Q. What did you think her motive was in concealing it from Mark Robinson?

A. Concealing? I don't know that word.

Q. Not putting it on record so that Mark Robinson might [314] know she was—she had made a deed to all her property?

A. She told me on the street that she was afraid Mark Robinson would find out about her and not give her any money; that is all; there was no more said after that.

Q. Didn't you think from that that she owed Mark Robinson money?

A. No; I didn't know enough in those days, about money matters, except what little I got working.

(Testimony of George De La Nux.)

Q. Didn't know enough? A. No.

Q. You knew that she was getting considerable money, sums of money, from Mark Robinson?

A. I didn't know that.

Q. You didn't know that?

A. No; only these couple of times we went together there, I think it was forty-five dollars at one time there. I don't quite remember the other; it wasn't a very big amount.

The COURT.—When you lived with her at Kalihi?

A. That is the time we went together.

Q. Was her husband living then, Houghtailing, or before she married Houghtailing?

A. Houghtailing was dead; I didn't see him then.

Q. At that time was she living well, had plenty to eat, nice home and all that? A. Yes.

Q. She wasn't working, was she?

A. Do you mean my mother?

Q. Yes. A. No.

Q. Where was she getting money from?

A. I don't know, except what I was told she had an income in the Robinson estate. [315]

Q. You were told that at that time?

A. No; later on I found out about that.

Q. When? A. When I was out at the plantation.

Q. When was that?

A. I could not state just when. I know that, remember that she was getting an income from the Robinson estate; how much I don't know, and never did know.

(Testimony of George De La Nux.)

Q. Did she have servants at that time when you were living with her?

A. Yes; a Japanese yard boy.

Mr. WITHINGTON.—When was it that you found out that she had an interest in the Robinson estate?

A. That I could not state, but I was told, that is, you know how conversation—

Q. Was it before 1905 or after?

A. Oh, long after.

The COURT.—At the time she came from Hamakua she told you she had enough income to take care of you without working?

A. Yes, she told me to come to Honolulu; she told me she could take care of me; never went into any questions; I left school when I was seventeen and didn't know enough to go into details of that kind.

Mr. WITHINGTON.—Did you know where any of this property was that was conveyed outside of the Kalihi property, homestead?

A. I do not know.

Q. Did you know that she had an interest in the Robinson block—you knew she had an interest in the Robinson block?

A. No, I don't know where it is.

Q. Did you know that she had an interest in the Bathel Street property, Bay Horse premises? [316]

A. I don't know where that is, even.

Q. Did you know that she had an interest in the —have property on Queen Street other than the Robinson block? A. I know nothing about it.

(Testimony of George De La Nux.)

Q. Property on Kauai?

A. I heard that she had property over there; I don't know.

Q. When was it that you heard of that?

A. I would say about, well, about six years, or seven years, something like that.

Q. Long after 1905? A. Yes.

Q. Do you know the Hotel and Bethel Street, know about having an interest in property there?

A. No, I don't know nothing, excepting the Kalihi home.

Q. Now, did you know that she had an interest in Pakaka? A. Never heard the name like that.

Q. Or Pelepo or Koehi, old homestead, stone store?

A. I don't know where those places are.

Q. Did you know whether she had property in Hoaeae in your neighborhood? A. No, I did not.

Q. First—did you know that she had stocks in Pioneer Mill? A. This is the first I heard of it

Q. Or Wailuku? A. No.

Q. Waialua? A. All news to me.

The COURT.—Did you know your grandmother at all? I mean your grandfather, your mother's father?

A. No, because when I was in school until I was seventeen—

Q. Who was your mother's father? [317]

A. I don't know of that, only what I was told.

Q. That is what I mean, anybody tell you, who was your grandfather?

(Testimony of George De La Nux.)

A. Yes; Mrs. Jaeger; her father was James Robinson.

Q. Mrs. Jaeger was your half-aunt?

A. Yes, because I visited out there quite frequently.

Q. How long since have you *know* Mrs. Jaeger?

A. I think it is going on two years.

Q. Did you know Mrs. Jaeger when you went to school?

A. No, not until this last two years; never knew her before; knew none of the family except Mark Robinson.

Q. When did you know Mark Robinson?

A. When I came to Honolulu and stayed with my mother, and she came up to Honolulu to get money.

Q. Did you know that Mark Robinson was your half-uncle? A. Not until later on.

Q. When?

A. Well, maybe five or six years, something like that. I don't know; I could not state positively just when.

Q. About how long ago, approximately—you came here in 1903 or 1902? A. No, in 1901.

Q. That is the time you heard of Mark Robinson?

A. No, I hadn't met him, oh, for months after.

Q. I mean in that year, 1901 or 1902?

A. Yes, maybe.

Q. Now, after that you knew that Mark Robinson was your half-uncle?

A. Well, might have been, I would say four or five

(Testimony of George De La Nux.)

years after, but I never believed it. I could not see how it was possible.

Q. Never spoke to your mother about it? [318]

A. No.

Q. Did you know Mrs. Allen, Bathsheba Allen, was your half-aunt? A. I never saw her.

Q. Or Mrs. Foster or Mrs. Jaeger?

A. Mrs. Jaeger and Mrs. Foster, I know them because I go to their houses.

Q. Did you know that they are your half-aunts?

A. Only through Mrs. Jaeger; she has studied the relationship.

Q. It is quite a large home in Kalihi?

A. I heard the other day it was half an acre or about.

Q. Judging from your own observation there, and of other homes, is it a big home or a small home?

A. It is a nice place; I could not say a very big home; it is a comfortable home for anyone to live in.

Q. How many children has Henry? A. Three.

Q. At the time you were living there were your brothers living there too, Henry and Charles?

A. Yes.

Q. How long were you living there at that time?

A. Six weeks.

Q. Were Henry and Charley working at that time?

A. No.

Q. And your mother supported the whole family?

A. Yes, but I found work in six weeks there, and I worked three weeks out of those six weeks, that is, the end of the six weeks.

(Testimony of George De La Nux.)

Q. Who provides the food, and servants?

A. My mother.

Q. Did you think at the time that your mother was well off? A. I did not know. [319]

Q. You did not know?

A. Of course not—no, of course, I didn't go into any details.

Q. Well, judging from the way she was running her home?

A. I didn't see nothing fancy there. We had poi, bread and coffee everything plain.

Q. And servants?

A. This yard boy was the only one I remember of.

Mr. WITHINGTON.—I have asked about several stocks. Do you know anything about her having Waialua or any other stocks? A. No.

Q. Or bonds? A. No.

Q. Now, the fact is, isn't it, that you didn't know that she had anything excepting the homestead?

A. Excepting the homestead, what I had been told or heard, that is, I heard she had property in Hanalei Kauai, where I don't know.

Q. That I understood you to say you heard afterwards? A. Yes.

Q. But after that—before that you didn't know anything about any property except the homestead?

A. No, that is all news to me.

Q. Now, you say she asked you and you promised that you wouldn't record the deed until her death; is that correct?

A. Do you mean for me to keep it quiet?

(Testimony of George De La Nux.)

Q. That you wouldn't record the deed, keep it quiet until her death? A. Yes.

Q. But you did record it? A. Yes.

Q. Without any notice to her? [320] A. Yes.

Q. Why did you do that?

A. Because she told me that she had called a lawyer, or seen lawyers and told her that she could change that deed.

Q. Now let us see; that was the reason why you recorded the deed, because she had told you that she had seen lawyers who told her she could change that deed? A. Yes.

Q. Now, when was that with reference to recording the deed?

A. That time I was in Halawa; I could not state just when.

Q. How long was it before you recorded the deed that she told you that?

A. I think it was shortly after, between 1907 and 1908, somewhere about there; that is the only thing that I can remember, when I was shifted over to Halawa.

Q. Why did you wait two or three years to record it?

A. Because there was no trouble between us at the time.

Q. What was the trouble up to that time?

A. No trouble, excepting as I have stated before, when she came to my house when I was living at Halawa, this boy Georgie would run away from her, never took notice of my grandmother.

(Testimony of George De La Nux.)

Q. That conversation you are referring to, the time she told you about the lawyer, that was in 1907 or 8; now, why did you wait two or three years before recording it?

A. Well, this trouble didn't all happen in one day. I am just saying after I went to Halawa she had come to me, had visited me three different, or four times and in those three or four times, four visits were not between 1907 and 1908, but in a stretch up to the time I went up to have it recorded. When the thing was recorded I don't know now.

The COURT.—July, 1910. [321]

WITNESS.—She had visited me, I think, to the best of my memory, only three or four times, when I was living at Halawa.

The COURT.—Between 1907 and 1910?

A. Yes; that is when I shifted to Halawa. In these three or four different times she visited me there this boy was always very shy of the grandmother—George, always run away, of course. I was at work all this time, you see. When I come home, she would say, "I don't like this boy," Every time she come around he would run away, and she spoke about it, spoke about wanting to put it over all on to the smaller boy because he took more of a fancy to the grandmother; being smaller he didn't know any better.

12 o'clock.

The COURT.—This matter will be continued until Monday morning at 9 o'clock. [322]

(Testimony of George De La Nux.)

Monday, June 23, 1919, 9 o'clock, A. M.

Continued cross-examination of GEORGE DE LA NUX.

Mr. WITHINGTON.—Mr. De La Nux, when your wife called you in and you found Judge Larnach, Mr. Breckons, and your mother besides your wife and Mrs. Richards there on this occasion in 1916, were you surprised to see them?

A. Yes, I was, I didn't know they were coming.

Q. Who of them did you know?

A. Well, I know them all, at least seen them all.

Q. Had you had anything to do with any of them?

A. No.

Q. Had you ever been to Mrs. Breckon's office?

A. Yes, once.

Q. With reference to what?

A. Well, with reference to this deed, this suit.

Q. When was that?

A. I don't know; I don't remember,

Q. That was before this case though?

A. Oh, yes.

Q. Shortly before or long before?

A. Do you mean before this case?

Q. No, before this meeting down at Aiea?

A. I went once to Breckon's office.

Q. You went once to Breckon's A. Yes.

Q. When?

A. Oh, long before that. [323]

Q. How long would you say?

A. I couldn't say at all.

Q. Was it a matter of months?

(Testimony of George De La Nux.)

A. I guess it was, but how long I can't say.

Q. Was it a year? You have spoken about a letter a year before? A. I can't say.

Q. And you went there about this matter?

A. Yes.

Q. Had you seen Judge Larnach before?

A. The same day.

Q. The same day you saw Judge Larnach where?

A. At his office.

Q. Did you talk with him about this affair, with Judge Larnach? A. I did.

Q. (Hands witness a letter.) Showing you a letter dated, Aiea, January 26, 1916, and ask you if that is your handwriting, and your signature. A. Yes.

Mr. WITHINGTON.—We offer this letter in evidence.

(Received and marked Plaintiff's Exhibit "I.")

(Reads:) "1–26–16." That means January 26, 1916? A. I guess so, yes.

Q. Did you—you say you sent it for your mother. Did you, *did you,* read your mother the letter?

A. That I don't know; I don't remember.

Q. (Hands witness another letter.) I will show you a letter of the same day, and I will ask you if that is your letter. A. Yes, I wrote that.

Mr. WITHINGTON.—We offer this letter in evidence. [324]

(Received and marked Plaintiff's Exhibit "J.")

(Reads.)

Q. Now, did Mr. Breckons write you a letter two or three days after this?

(Testimony of George De La Nux.)

A. It was before that, if I remember.

Q. You think it was before that?

A. Yes, before that; that how I came to write this letter, the first I knew of this lawsuit.

Q. I will ask you whether this letter which is, showing you a letter purporting to be dated, February 1st, 1916, is a letter in your handwriting and is your letter. A. Yes.

Mr. WITHINGTON.—We offer this letter in evidence and ask that it be received and marked.

(Received and marked Plaintiff's Exhibit "K.")

(Reads.)

Q. Does that letter refresh your recollection to the fact that you received a letter from Mr. Breckons about coming down to the platform between these letter? A. Yes.

Q. Now, have you that letter, Mr. Breckon's letter?

A. No.

Q. But it was a letter making, asking if it would be agreeable for your mother and Mr. Larnach to come down there?

A. I know I got a letter, but what was in that letter to-day I don't know, because I didn't keep the letters.

Q. Does that refresh your recollection?

A. Yes, but what was stated in the letter I don't know.

Q. You say here you will be glad to see them down at the plantation? A. Yes. [325]

Q. Where did you get the information that they were coming down?

A. I got a letter from Mr. Breckons.

(Testimony of George De La Nux.)

Q. That letter you have no doubt was dated two days after your letter dated the 28th?

A. Yes, but when they were coming down they didn't say.

Q. You didn't know when they were coming down?

A. Yes.

Q. What did you mean then when you said you were surprised?

A. In this way, I didn't know they were coming until I saw them there, that I didn't know the particular day that they would come.

Q. That is all you meant? A. Yes.

Q. Now, you say that something was said about a trust deed? A. Trust deed?

Q. Wasn't that the expression?

A. What is that?

Q. Oh, I may be wrong about that, this trust deed. You say that Mr. Breckons stated what your mother wanted done, "To give the Kalhi home to me, to my two children, and divide up the rest of the property amongst the boys. That is the meaning, I think, myself and my two brothers, and I didn't agree to anything like that."

Q. Did you so testify?

A. Testified when?

Q. Last week when you were on the stand on direct examination. A. Please read that over again.

Q. "He," meaning Breckons, "then started to tell me about what was to be done, that is, what my mother wanted to have [326] done."

"Question: What was said? Answer: To give the

(Testimony of George De La Nux.)

Kalihi property to me, to my two children, and divide up the prest of the property amongst the boys. That is the meaning, I think, myself and my two brothers, and I didn't agree to anything like that."

Q. Now, did you so testify?

A. That is what Breckons told me.

Q. Well, I will ask you if you testified the other day to this effect that Breckons did tell you that?

A. Yes, yes.

Q. How was it to be divided up—was there anything said about that?

A. Nothing at all, because I didn't know what property my mother had.

Q. Wasn't—didn't Mr. Breckons propose that it should be divided equally?

A. He proposed that, but what property is I don't know.

Q. I didn't ask you that, if you knew the property, but the property he proposed to have divided equally?

A. Yes, what he said.

Q. Did he say anything about how it was to be taken care of, turned over to you three boys at once?

A. Didn't say that.

Q. Sure about that? A. Sure about that.

Q. Didn't he say that it was to be turned over to somebody in trust, his proposition, and your mother's proposition was to turn it over to somebody else in trust for her lifetime, then to be divided equally amongst you three boys?

A. I didn't hear anything like that. [327]

Q. When you parted there was no plan, I under-

(Testimony of George De La Nux.)

stood you to say, nothing further to be done?

A. No.

Q. Did you receive any papers from Mr. Breckons or Judge Larnach after that? A. I don't know.

Q. Haven't you got a draft of the complaint that was sent to you?

A. No, what papers I had I had turned over to Mr. Andrews.

Mr. WITHINGTON.—I would like to have it produced, the preliminary draft of the complaint, a letter dated February 26th, 1916?

(Mr. Andrews produces complaint.)

Mr. ANDREWS.—I haven't any letter.

Mr. WITHINGTON.—Did you receive from Mr. Breckons a letter, original letter, a carbon copy of which I showed to you?

A. I remember something like that.

Q. Can you say whether this is a copy of the letter—have you any doubt about that?

A. Well, I know something of this here, but this conversation part of it, I don't know nothing about that, these few lines here.

Q. I didn't ask you whether you knew about it, but you got the letter containing that?

A. That I can't say.

Q. What did you do with the letter?

A. If I had one, as I say, all papers what I had I turned over to Mr. Andrews; that is the best I know.

Q. You say you did receive a letter; did you receive this paper which Mr. Andrews has produced, with the letter which you refer to from Mr. Breckons?

(Testimony of George De La Nux.)

A. Yes, I remember this (referring to the complaint). [328]

Q. And that was received with the letter that it referred to?

A. I might have forgotten; I can't say.

Q. But you did receive it at the same time?

A. Yes, I did.

Q. About the date? A. About this; yes.

Mr. WITHINGTON.—We will offer this letter a little later when we prove the letter.

Q. Now, at this conversation at Aiea did your mother say to you, or did she say this in substance, "Sonny, you know mother didn't intend to give all the property, only intended to give the homestead," and further, "Sonny, you know mother was jigging when she signed that deed," and you replied, "If mother says that that settles it," or that settled it, or that is all there is to it. Did any conversation of that kind take place?

A. Yes, my mother said that.

Q. You said if she said so that settled it?

A. Well, that was her business.

Mr. WITHINGTON.—We will offer through Judge Larnach the letter that we have referred to, together with the complaint that we has identified, otherwise than that we have finished.

That is all.

Mr. ANDREWS.—That is all. We rest, if the Court please.

(Here follows testimony by Mrs. Moses.) [329]

Testimony of Mrs. Manuel Moses, for Petitioner.

Direct examination of Mrs. MANUEL MOSES, called for petitioner, sworn, testified as follows:

By Mr. WITHINGTON.—Your name, please?

A. Mrs. Manuel Moses.

Q. Where do you live, Mrs. Moses?

A. Up Kalihi.

Q. Right here in Honolulu? A. Yes.

Q. How many years have you lived up Kalihi?

A. Nineteen years.

Q. Do you know Mrs. Houghtailing? A. Yes.

Q. Do you know Mr. George De La Nux, who sits by his counsel? A. Yes.

Q. Do you know this lady (pointing to Mrs. Lahapa De La Nux)? A. Yes.

Q. How long have you known these folks that I have indicated to you, Mrs. Moses—Mrs. Houghtailing, Mrs. Lahapa De La Nux, George De La Nux—how many years have you known them?

A. Mrs. Houghtailing, I know her about nineteen years now.

Q. How long Mr. George De La Nux?

A. About ten years ago.

Q. How long Mrs. Lahapa De La Nux?

A. Just the same.

Q. Now, did you ever live anywhere near Mrs. Houghtailing in Kalihi? A. Yes.

Q. When? A. I lived close by her. [330]

The COURT.—When? A. 1900.

Mr. LARNACH.—Until what date, or day?

A. 1900 I married my husband, and I stayed right

(Testimony of Mrs. Manuel Moses.)

makai of Mrs. Houghtailing.

Q. How close to Mrs. Houghtailing's house?

A. Until about fifty or sixty feet.

Q. On the same street? A. Yes.

Q. Right next to Mrs. Houghtailing's yard?

A. Right makai.

Q. Did you leave that place that you stated you lived since 1900?

A. From 1900 to 1913, and then I moved out.

Q. Now, did you see George De La Nux and Mrs. Lahapa De La Nux any time at Mrs. Houghtailing's house during that time?

A. Yes, I saw them there.

Q. Did you at any time hear any big row in which Mrs. Lahapa De La Nux and George De La Nux took any part in?

A. Yes, they had a row with Mrs. Houghtailing.

Q. Will you please tell us, tell his Honor, just what you saw, just what you heard, please?

A. About ten years ago, at Mrs. Houghtailing's house, at night, about seven o'clock at night, there is a big fight in Mrs. Houghtailing's house, right in the house, so I heard Mrs. Houghtailing's voice, talking and noisy in the house, so I come from my house, right to Mrs. Houghtailing's place, and I saw Mrs. De La Nux on the ground, on the grass.

Q. Mrs. Lahapa De La Nux?

A. She was drunk, she couldn't hardly get up, Mrs. Houghtailing was standing out on the verandah and calling Mrs. De La Nux, "Wahine hokana." Mrs. Houghtailing was calling [331] "wahine hokana,"

(Testimony of Mrs. Manuel Moses.)

because I was right there and heard it.

(The Court, the witness and the Interpreter talking in Hawaiian.)

INTERPRETER.—Then Mrs. De La Nux said, "I don't know what this is all about."

The COURT.—(Interpreting.) "I don't know why I am treated this way."

Mr. LARNACH.—Who was saying this?

A. Mrs. De La Nux.

Q. Was Mrs. De La Nux standing up or sitting down? A. Sitting down on the grass.

Q. How was she dressed, if she was dressed?

A. Only her chemise, calico chemise.

Q. How do you know?

A. Because I went right up to her.

Q. What did you say to her or anyone else?

A. I went there, I went with her because I was the one who put on her clothes; she didn't listen to me, but when I tried to get her in the house, she went out on the road, right on the road, and I went to get her husband, George De La Nux.

Q. What did he do?

A. Came right out to where his wife was on the road and grabbed her by the hand and pulled her in the house.

Q. Was she sober or otherwise?

A. Mrs. De La Nux was drunk and Mrs. Houghtailing was drunk.

Q. Was that the only time that you saw George there when his mother was drinking?

A. I was over there that night they were drinking.

(Testimony of Mrs. Manuel Moses.)

Q. Any other time that you saw Mrs. Houghtailing drinking [332] when George was there?

A. I see Mrs. Houghtailing drinking; after that George was there and the wife.

Q. Now, you left in 1913—left this house next to Mrs. Houghtailing's in 1913? A. Yes.

Q. How long before you left do you think it was did this row occur—one year, one week, how long, to the best of your recollection—do you understand the question?

A. I think it is about three years.

That is all.

Cross-examination.

Mr. ANDREWS.—What makes you remember that it was three years before you left that this happened?

The COURT.—How do you remember that?

A. About the year 1910.

Q. What makes you remember that it was the year 1910?

A. I am not sure, but that is the time that I remember.

Q. Why do you think it was 1910?

A. That is the time that she (the witness) judges it was.

Q. Is there any other thing that makes you fix the year as the year 1910, or has anybody told you to say 1910?

A. She remembers it was 1910 on account of her brother-in-law dying that year ago.

Q. How long did you say you knew Mr. De La Nux

(Testimony of Mrs. Manuel Moses.)

and Mrs. De La Nux? A. About ten years.

Q. You had been introduced to them, talk to them, for ten years? [333]

A. I was acquainted with them at that time.

Q. How many times did you talk to them, visit them?

A. I didn't use to talk to them, only that night. I have never talked to them except that night.

Q. Have you ever been introduced to them?

A. No.

Q. Then when you say you have known them ten years, you have only seen them? A. Yes.

Q. How did you know who they were?

A. Because I heard Mrs. De La Nux calling them George and the wife—Mrs. Houghtailing, excuse me.

Q. How did you, would you hear that?

A. Mrs. Houghtailing always calling out sometimes from her house.

Q. You could hear it from your house?

A. Yes, come right up there, around there, and stay.

Testimony of Henry De La Nux, for Petitioner (Recalled).

HENRY DE LA NUX, recalled on behalf of the petitioner, testified as follows:

Mr. LARNACH.—Now, you heard your brother George testifying here, that when he, your brother George, first came to your mother's house your mother started to talk about property, that she wanted to turn all her property over to your brother,

(Testimony of Henry De La Nux.)

and that she said those things in the presence of my brothers, Mr. George testified, meaning yourself and your brother Charley; now did any such conversation occur? A. Not in my presence. [334]

Q. In your presence? A. No.

Q. Now, you heard Mrs. Kaae testify on the witness-stand, in which she denied there was any trouble at Moanalua at your house?

A. Yes, I heard her say that.

Q. Will you please tell us if there was such trouble, if there was any?

Mr. ANDREWS.—We object to that as immaterial matter, brought out on cross-examination.

Mr. LARNACH.—We will rest right there; we will not press it, your Honor.

Testimony of Charley De La Nux, for Petitioner (Recalled).

CHARLEY DE LA NUX, recalled on behalf of petitioner, testified as follows:

Mr. LARNACH.—You remember at any time your mother talking about giving her property to George?

A. I do not.

Q. Talking about that in your presence?

A. I do not.

Q. Did any such conversation ever take place in your presence? A. It did not.

That is all.

No cross-examination.

Testimony of Judge A. D. Larnach, for Petitioner.

Direct examination of Judge A. D. LARNACH, called for petitioner, sworn, testified as follows: [335]

Mr. WITHINGTON.—You are one of the attorneys in this action?

A. I am. I have been engaged by Mrs. Houghtailing as her attorney since January, 1916.

Q. Did you see the defendant George De La Nux at your office at any time? A. Yes.

Q. When was it?

A. In 1916, in January, Mr. De La Nux came to my office in response to a letter which I wrote to him. You haven't got that letter, Mr. Andrews?

Mr. ANDREWS.—No.

Mr. WITHINGTON.—You haven't a copy of that letter?

A. No, I have been unable to find it.

Q. What took place at this visit?

A. He visited at my office and I explained to Mr. De La Nux that I was engaged as his mother's attorney, and explained his mother's views in drawing up the deed.

Q. What did you say about that?

A. The exact words I don't remember, but I explained to him that his mother denied having intended to convey in the deed, which I, a copy of which I had—

Mr. ANDREWS.—If that is for impeachment, I object.

Mr. WITHINGTON.—No.

(Testimony of Judge A. D. Larnach.)

Mr. ANDREWS.—We object to this conversation as irrelevant and not proper rebuttal.

Mr. WITHINGTON.—We are offering it for the purpose of contradicting the witness in saying that his mother did know all about it, that the deed was read to her, that she frequently spoke of all her property.

Mr. ANDREWS.—Then it can only be for purpose of impeachment; [336] there was no foundation laid for any such statement.

Objection sustained.

Mr. WITHINGTON.—I am not very particular about this matter.

Q. What was the next you heard from George?

A. Well, after a visit to my office we together made a visit on the same day to Mr. Breckons' office, where the situation was again gone into.

Q. I don't care about that, but I show you a letter which is marked Plaintiff's Exhibit "I" and ask you if you received that letter?

A. Yes, I received that letter from Mr. George De La Nux.

Q. Was that in consequence of any conversation which you had in your office?

A. Yes; we made an arrangement for Mr. George De La Nux to come up some days later when we could get Mrs. Houghtailing, we, meaning Mr. Breckons and I, and George De La Nux was, according to his letter to me, to write this letter to me.

Mr. WITHINGTON.—That was Plaintiff's Exhibit "F."

(Testimony of Judge A. D. Larnach.)

Q. I show you a letter which is marked Plaintiff's Exhibit "K" and ask you whether you have seen that before? A. Yes.

Q. In consequence of it did you do anything, if so, what?

Mr. ANDREWS.—That we object to as not proper rebuttal.

Mr. WITHINGTON.—This is the interview down at Aiea; this is preliminary.

Mr. ANDREWS.—To contradict him that he knew you were coming down?

WITNESS.—Yes; the letter was sent to George De La Nux in response to a letter which I had received wherein he stated he was unable to come up and an arrangement was made to go down, that I know, because I saw the letter, I don't remember, [337] the contents, and this letter was addressed to Mr. Breckons, and I saw the reply.

Q. You saw the reply to the letter which you say arranged to come down to Aiea? A. Yes.

Q. Did you go down? A. We did.

Q. Who went?

A. Mr. Breckons, Mrs. Manuel Richards, Mrs. Charles De La Nux, Mrs. Houghtailing and myself.

Q. Will you state what took place there, what was said and done?

Mr. ANDREWS.—That we object to as not rebuttal; it is a part of their case in chief; they can't hold back half of their witnesses and then put it on in rebuttal.

(Testimony of Judge A. D. Larnach.)

Mr. WITHINGTON.—I don't think that is an accurate statement of the situation in this case. We put on evidence in chief, and the defendant put on witnesses who contradicted our witnesses; in addition they stated certain other things that had taken place, on cross-examination the witness denied every material fact, for instance, denied that an arrangement was made to—for an amicable settlement of the matter, in pursuance of which the letter of February 26th was written and the letter of ——, and the bill to be filed was sent down. Now, we have the right to contradict what was said, alleged to have been said there which were not brought out in direct examination, and no attempt made to bring them out, witnesses were not asked whether these things were said—and I refer to what I would call the cross-examination of Mrs. Houghtailing by her son. Now, we certainly have the [338] right to go into these matters and contradict.

Mr. ANDREWS.—If there was anything that was not in the case—it was part of their case in chief, witnesses were put on the stand stating exactly what happened down there, then Mr. George De La Nux comes and his wife, come on and state what they remember happened, then holding back some of their witnesses and again starting in to testify what happened down there—

Mr. WITHINGTON.—If it is objected to I will ask the questions in a little different way. I will withdraw the question.

(Testimony of Judge A. D. Larnach.)

Q. Now, after you got there was there any general protest?

Mr. ANDREWS.—That we object to as not rebuttal; both sides have testified to that.

Objection sustained.

Mr. WITHINGTON.—You heard Mr. George De La Nux's testimony on the stand, did you not, Judge Larnach? A. Yes.

Q. Did anything like this take place?

"Well, then, I started to ask my mother questions, there were three questions I think I asked her, the first question was, 'Did you not make out the papers the way they are to-day?' and she started to cry, and I says, 'Now, mother, you came here for business purposes and not to cry,' I says, 'Brace up,' and I got up off my chair and went over to her to humor her along, that is, not to cry. I went and sat down again and she braced up and she says, 'Well, you know, Sonny, I am, Mama is something like that, is a drinking woman, and I didn't intend to give you everything; it was only [339] the home.' So I came with the second question, asked her if I had forced her, if I was the one that had had made the papers out. The third question—'What did she say to that?

"She didn't answer. The third question I says, 'Ain't it so, the way your two sons have been treating you all these years that you made out the paper the way it is to-day?' I followed it right up, 'Ain't it so they used to call you a

(Testimony of Judge A. D. Larnach.)

'son-of-a-bitch,' call you a 'bastard,' used to call you a 'whore,' I says, 'Ain't that the reason you made that paper out the way it is to-day?' and I got worked up while I was saying this, saying those few words. Excuse me, excuse my language, your Honor. That is the way it ended up.

"What did she say to that?

"She said, 'Yes.'"

Q. Did that or anything of that sort take place?

Mr. ANDREWS.—We object to that, if the Court please, as not rebuttal.

The COURT.—They can't anticipate that question at all. I don't see how, if it was all made up—they have a right to put witnesses on in rebuttal.

Objection overruled.

WITNESS.—Now, it is difficult to say that nothing like that happened, what really happened, if I may state, if I am permitted to state was thus, it is impossible—

Mr. ANDREWS.—We certainly object to Mr. Larnach giving his version of what happened there.

Mr. WITHINGTON.—Only give that part of it which relates to these particular matters he referred to, where he says [340] he questions his mother about how the thing was done, and what she had said, in reference to it.

A. The only thing that Mr. George De La Nux said was this—

Mr. ANDREWS.—We object to that. I would

(Testimony of Judge A. D. Larnach.)

ask whether the question is capable of being answered yes or no.

WITNESS.—No, that is not—

Mr. ANDREWS.—Why not?

The COURT.—Whether or not his statement is true or not.

WITNESS.—Portions of it, for instance, Mrs. Houghtailing said that, to her son, "You know, Sonny, mother was jigging when she signed that deed." That corresponds to a small extent of what was said, she further said, "Mother didn't intend to give anything other than the homestead"; that corresponds to a slight degree with what was said, so that I can't say that none of it was said, but George De La Nux didn't cross-question his mother. Mr. George De La Nux, his behavior right through was—

Mr. ANDREWS.—We object to that as not rebuttal.

Mr. WITHINGTON.—Do you mean to say that he didn't ask any of these questions that I have read to you?

A. He said, "It is up to you, Mother." After Mr. Breckons had made his statement, "It is up to you, Mother, whatever mother wishes it is all right."

Q. Well, did he ask her these three questions?

A. He didn't ask her if she had been called names; she did cry, that part of it is correct; he didn't get up and go over and pat her shoulder, anything like that; didn't tell her that she had come down there

(Testimony of Judge A. D. Larnach.)

for business purposes; I think that part of his statement that he is [341] mistaken.

Q. I am asking whether he asked the three questions which he says he asked her, or any of them?

A. Give me the first question.

Q. "Did you not make out the papers the way they are to-day?"

A. He didn't ask her that. Mr. Breckons asked her that.

Q. Did he ask her if he had forced her, if I was the one that had her make the papers out?

A. No, he did not.

Q. Did he ask her, "Ain't it so, the way your two sons have been treating you all these years that you made out the papers the way it is to-day"?

A. He did not.

Q. Or anything of that kind?

A. No, he didn't cross-question her that way.

Q. And you say he didn't say, "Ain't it so they used to call you a 'son-of-a-bitch,' call you a 'bastard,' used to call you a 'whore' "?

A. He did not.

Q. Or anything of that sort? A. No.

Q. Now, when you went away was there any arrangement made as to what would be done?

A. Yes.

Q. State what it was.

A. Mr. Breckons explained to Mr. George De La Nux that he, George, could not do anything without permission of the court, that it would be necessary for him to be appointed guardian, or someone ap-

(Testimony of Judge A. D. Larnach.)

pointed guardian, and we suggested George there, and bring a proceeding in court to have this suit corrected. Mr. Breckons told Mr. George De La Nux [342] that papers would be sent down for his information with our suggestion in the matter. Such a paper was sent down, and I recognize that paper that Mr. George De La Nux received.

Q. Mr. George De La Nux testified that he did receive a letter about February 26th, 1916?

A. Yes.

Q. Can you state whether that is a copy of the letter which was sent? A. It was.

Q. Who was it sent by—signed by?

A. That I am not sure. I think it was signed by Mr. Breckons, or Mr. Breckons and myself; the letter was written in my office, that is a carbon copy; it has been in my office ever since.

Q. Is this a copy of the complaint referred to?

A. Yes; that is a copy of the complaint referred to, which copy you will notice goes on the theory that a mistake was made, which arrangement or suggestion had come from Mr. Breckons, which suggestion Mr. George De La Nux had acquiesced in, rather than charge fraud we would call this a mistake.

Mr. WITHINGTON.—We offer the letter in evidence and ask that it be marked in order.

Mr. ANDREWS.—We object to it as being irrelevant, incompetent and immaterial, nothing to do with the question as to what happened in 1905, even if that is right that he agreed to this wouldn't—simply a matter of settlement of property rights.

(Testimony of Mrs. Lahapa De La Nux.)

The COURT.—The carbon copy of the letter will be received and marked Plaintiff's Exhibit "L." [343]

Mr. WITHINGTON.—We offer the bill.

Mr. ANDREWS.—We make the same objection, not having been agreed to by Mr. George De La Nux or signed by him or any action taken on it, not being binding in any way, not proper rebuttal.

Objection overruled.

The COURT.—The document may be received and marked Plaintiff's Exhibit "M."

Mr. WITHINGTON.—I think that is all.

Mr. ANDREWS.—No questions. That is all.

RESPONDENTS' REBUTTAL.

Testimony of Mrs. Lahapa De La Nux, for Respondents (Recalled).

Mrs. LAHAPA DE LA NUX, recalled by respondents on their surrebuttal.

By Mr. ANDREWS.—Now, you try and speak English with me. You saw that witnesses Mrs. Moses on the witness-stand to-day? A. Yes.

Q. Did you ever see that woman before?

A. No.

Q. Do you know who she is? A. No.

Q. You heard her tell about your being in your chemise, she helping you up; did that ever happen?

A. No, I never did any such thing.

Q. Were you ever drunk?

A. No, I am not a drinking woman. [344]

Mr. ANDREWS.—That is all.

Mr. WITHINGTON.—That is all.

Testimony of George De La Nux, for Respondents (Recalled).

GEORGE DE LA NUX, recalled, respondents' surrebuttal.

By Mr. ANDREWS.—You saw that Mrs. Moses on the stand?

A. Yes.

Q. Said she had known you for ten years?

A. Yes.

Q. Did you ever see her before?

A. Not until this morning; don't remember ever seeing the person.

Q. You heard her make the statement of her helping your wife into the house; do you remember any such occasion? A. No.

Mr. WITHINGTON.—This matter was both gone into on direct.

The COURT.—She said she knew of that.

Mr. ANDREWS.—Was she present on any such occasion or time when you helped her into the house—was she present when you helped her, helped your wife, who was in her chemise, into Mrs. Houghtailing's house?

A. Never saw the woman until this morning.

Mr. ANDREWS.—That is all.

That is our case. We are willing to submit it without argument, your Honor.

The COURT.—The Court will take the matter under advisement.

REPORTER'S CERTIFICATE.

I HEREBY CERTIFY that the foregoing is a

true and accurate transcript of my notes taken in the above-entitled cause, together with all objections by counsel, rulings by the Court, and exceptions thereto.

GILLSON D. BELL,
Official Court Reporter.

Honolulu, T. H., September 5th, 1919.

Filed at 2 o'clock P. M. Sept. 15, 1919. B. N. Kahalepuna, Clerk. [345]

Filed at 2 o'clock P. M. Sept. 15, 1919. B. N. Kahalepuna, Clerk. [346]

Filed at 2 o'clock P. M. Sept. 15, 1919. B. N. Kahalepuna, Clerk. [347]

Plaintiff's Exhibit "F."

KNOW ALL MEN BY THESE PRESENTS: THAT I, REBECCA HOUGHTAILING (nee MRS. P. C. A. DE LA NUX), of Honolulu, Island of Oahu, Territory of Hawaii, for and in consideration of My Love and Affection for my Grand Sons GEORGE DE LA NUX, JR., and DANIEL DE LA NUX, and in further consideration of the sum of One Dollar ($1.00) to me in hand paid by my said Grand Sons GEORGE DE LA NUX and DANIEL DE LA NUX, the receipt whereof is hereby acknowledged, do hereby bargain, grant, sell, Transfer and Convey unto my said Grand Sons GEORGE DE LA NUX and DANIEL DE LA NUX, all and singular that certain piece or parcel of Land situate on Kamehameha IV Road, Kalihi, Honolulu, Island of Oahu, Territory of Hawaii, and being the same now occupied by me as my Home, together with the improvements thereon.

And also all and singular My Real and Personal property by me possessed and wheresoever situate.

TO HAVE AND TO HOLD the same unto my said Grand Sons GEORGE DE LA NUX and DANIEL DE LA NUX, their heirs and assigns, together with all and singular the rights, privileges, rents and income thereof, Tenements, Hereditaments and Appurtenances Forever, Reserving however, unto me, the said REBECCA HOUGHTAILING, a Life Estate therein.

IN WITNESS WHEREOF, I, the said REBECCA HOUGHTAILING, have hereunto set my hand and seal this 10th day of June, A. D. 1905.

REBECCA HOUGHTAILING.

In presence of:

WILLIAM SAVIDGE.

Territory of Hawaii,
County of Oahu,—ss.

On this 8th day of November, A. D. 1905, personally appeared before me Rebecca Houghtailing (W.) known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein set forth.

[Notarial Seal] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory of Hawaii.

($2.00 Stamps.) [348]

[Endorsements]: E. No. 2090. Plaintiff's Exhibit "F." Filed June 16, 1919. Claus L. Roberts, Clerk.

4170

G. F. De La Nux 9:18
Indexed.

Territory of Hawaii,
Office of the Registrar of Conveyances.

Received for record this 2d day of July, A. D. 1910, at 9:18 o'clock A. M., and recorded in Liber 328, on pages 476–477, and compared.

CHAS. H. MERRIAM,
Registrar of Conveyances.

By ——————————,
Deputy Registrar.

Recording Fee $2.—Pd.
Pd. 2/2.

No. 1220. Rec'd and Filed in the Supreme Court Sept. 16, 1919, at 8:55 o'clock A. M. Robert Parker, Jr., Assistant Clerk. [349]

Plaintiff's Exhibit "I."

Aiea, 1/26/16.

Mr. Larnack.
Dear Sir:

On my return home to the plantation I have thought over the matter very carefully and from what I can see coming ahead in the line of my work I wish to state that I will not be able to go up Friday afternoon. We have installed a lot of new sugar machinery and need considerable attention yet.

Talking over my mother's affairs I think I will have no more to say but keep quiet as my mother has employed you as attorney without saying anything to me about it. I don't think she should have been so hasty, but however let things go as she wishes, it will come all out in the end. So with these few lines to you and hope there will be a better understanding in the near future. I will keep quite and await the outcome I have sent for mother for a consultation I hope I will have the pleasure of meeting her.

I remain

Yours truly

GEO. F. DELANUX. [350]

[Endorsements]: "I." E. No. 2090. Plaintiff's Exhibit "I." Filed Jun. 23, '19. Claus L. Roberts, Clerk.

No. 1220. Rec'd and Filed in the Supreme Court Sept. 16, 1919, at 8:55 o'clock A. M. Robert Parker, Jr., Assistant Clerk. [351]

Plaintiff's Exhibit "J."

Aiea, 1/26/16

Dear Mother

I am droping you a few lines, asking of your kindness to answer this letter or come in person. I have wrote to you a few weeks ago but I have received no answer, if I had the time I would go up and see you. We have installed a lot of new machinery this year and needs considerable attention for some time to come. I don't think I have done anything out of the way that is keeping you away from me. I think I have done my duty, I do not

know of a single time that I have abused you if so I would like to know about it. It seems to me that there is something in the wind if there is don't keep it to yourself because it will be found out sooner or later. If you have any grievance's why not some straight forward with it.

Should it be your wishes to throw me down at this time for any reason unknown to me well mother it is up to you. However if you don't care to come down, write a few lines. I am not writing to you to Homalimali you in any way shape or form, I wish to [352] *to* make it plain.

As I say there is something in the wind, I hope I can see you personally to find out were the friction is. Don't be afraid to come after you have read this letter over carefully. I would like to know why this long silence has been between us. I think I have an idea were it is all coming from. Now Mother should you see your way clear come down, don't be afraid your welcomed to my home and whatever I have at any time.

The machine bearing this note is at your disposal, and will also conduct you home safely at any time you wish. May I have the opportunity of meeting you.

I am

Your Son.

GEORGE F. DELANUX

Aiea Box 72.

"J." E. No. 2090. Plaintiff's Exhibit "J." Filed Jun. 23, '19. Claus L. Roberts, Clerk.

No. 1220. Rec'd and Filed in the Supreme Court Sept. 16, 1919, at 8:55 o'clock A. M. Robert Parker, Jr., Assistant Clerk. [353]

Plaintiff's Exhibit "K."

Feb 1st 1916

Mr. Breckons
Dear Sir

Your letter of the 1/28th instance I have received and contents noted. I shall welcome my mother and Mr. Larnack to visit me at the Plantation as I have not the opportunity for the present to go up to town. I am thanking you for the extended courtesy you have given me.

With this short letter I will close hopping I shall have the pleasure of meeting my mother and Mr. Larnack here at Aiea at my home.

I am

Yours truly,
GEORGE F. DELANUX.

Houghtailing. "K." E. No. 2090. Plaintiff's Exhibit "K." Filed Jun. 23, '19. Claus L. Roberts, Clerk.

No. 1220. Rec'd and Filed in the Supreme Court Sept. 16, 1919, at 8:55 o'clock A. M. Robert Parker, Jr., Assistant Clerk. [354]

Plaintiff's Exhibit "L."

E. No. 2090. Plaintiff's Exhibit "L." Filed Jun. 23, '19. Claus L. Roberts, Clerk.

Honolulu, T. H., February 26th, 1916.

Mr. George De La Nux,
Aiea, Oahu,
T. H.

Dear Mr. De La Nux:

Enclosed you will find a copy of a Bill of Complaint which we propose to file in the Circuit Court, asking for a reformation of the deed which we have heretofore discussed; also asking that you be appointed by the Court as the guardian *ad litem* for your two sons. The facts contained in this complaint have been gathered by us from the conversations with your mother and yourself.

Mr. Larnach, however, is uncertain as to whether or not you were present when the deed was executed. We would like to hear from you whether you were present when the deed was executed. We would also wish you to carefully read over the Bill of Complaint, and any facts that are not correct inform us of. These facts we expect to prove by your mother and yourself.

Asking you to return the Complaint at your earliest opportunity,

Very truly yours,

_____.

No. 1220. Rec'd and Filed in the Supreme Court Sept. 16, 1919, at 8:55 o'clock A. M. Robert Parker, Jr., Assistant Clerk. [355]

Plaintiff's Exhibit "M."

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

AT CHAMBERS—IN EQUITY.

BILL FOR REFORMATION OF DEED.

REBECCA HOUGHTAILING,

Plaintiff,

vs.

GEORGE DE LA NUX, Jr., and DANIEL DE LA NUX,

Defendants.

BILL OF COMPLAINT.

To the Honorable the Presiding Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, Sitting at Chambers, in Equity:

Your orator, Rebecca Houghtailing, the plaintiff above named, brings this her bill of complaint against the defendants above named, and thereupon your orator complains and alleges:

I.

That she has been all her lifetime a resident of the Territory of Hawaii, and is the owner of a very considerable amount of property, both real and personal, situated and located within the Territory of Hawaii, and that included within the property thus owned by her is certain property known as her homestead, which is situated and located on Kamehameha IV Road, in Kalihi, Honolulu, Island of Oahu, Territory of Hawaii. [356]

II.

That she has a number of children and grandchildren residing within the Territory of Hawaii, two of the said grandchildren being the said defendants herein.

III.

That, being desirous of vesting in the defendants herein the title to the homestead hereinbefore mentioned, reserving unto herself a life interest therein, your orator, in the year 1905, made known to her son, one George F. De La Nux, the father of the said defendants, her desire to so vest the said property, and that thereupon directions were given a Scrivener to draft the deed necessary to carry out said intention.

IV.

That thereafter, and on the 10th day of June, A. D. 1905, there was presented to your orator for signature a deed, a copy of which is hereto attached, incorporated herein by reference, and marked Exhibit "A." That upon the presentation of said deed, your orator, in the presence of the father of said defendants, the said George F. De La Nux, executed the same. That at the execution of the same, both your orator and the said George F. De La Nux relied upon the accuracy of the Scivener employed, and did not read the said deed, nor, until recently, discover that the said deed contained a provision by which was transferred to the defendants herein, not only the homestead in question, but likewise all of the other property, of every kind, character and description, both real and personal, owned by your orator at the

time of the execution of the said deed; that in and by said deed [357] your orator intended to convey to the defendants only the homestead, as hereinbefore set forth, reserving unto herself a life interest, and did not intend to convey to said defendants any property other than said homestead; that the insertion of the provision in said deed, conveying property other than said homestead, was due to the mistake of the scrivener who drew said deed, and also to the mutual mistake of plaintiff and the said George F. De La Nux.

V.

That thereafter, and upon discovery of said mistake, this plaintiff made demand of the said George F. De La Nux, that the said mistake be corrected, but that the said George F. De La Nux refused so to do, basing his refusal on the fact that the defendants herein were minors.

VI.

That the said defendants herein are minors, the said George De La Nux, Jr., being of the age of —— years, and the said Daniel De La Nux being of the age of —— years.

VII.

That the plaintiff herein has no adequate remedy at law.

IN CONSIDERATION WHEREOF, and inasmuch as your orator has no sufficient remedy at law, your orator prays as follows:

FIRST. That an order of the Court be entered, appointing some person to act as guardian *ad litem* for the said defendants, suggesting in this behalf

that the father of said defendants, to wit, the said George F. De La Nux, be appointed such guardian *ad litem.* [358]

SECOND. That the process of this Honorable Court may issue, according to law, to be served on the said guardian *ad litem,* requiring the said defendants, and each of them, to appear herein within the time by law provided, and answer the several allegations in this bill of complaint contained; answer under oath, however, being in that regard hereby expressly waived.

THIRD. That upon the final hearing herein, it may be decreed that the deed herein incorporated may be reformed by striking therefrom the words: "And also all and singular my real and personal

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property by me possessed and wheresoever situate."

FOURTH. That your orator may have such other and further relief in the premises as to this Honorable Court may seem meet and proper, and which equity may require.

_____,

Plaintiff.

Territory of Hawaii,
City and County of Honolulu,—ss.

Rebecca Houghtailing, being first duly sworn according to law, deposes and says that she is the plaintiff in the above-entitled cause; that she has read the above and foregoing bill of complaint, and knows the contents thereof, and that the allegations contained in said bill of complaint are true of her own knowledge.

_____.

Subscribed and sworn to before me, this —— day of February, A. D. 1916.

_____,

Notary Public, First Judicial Circuit, Territory of Hawaii. [359]

EXHIBIT "A."

Know all men by these presents: That I, Rebecca Houghtailing (nee Mrs. P. C. A. De La Nux) of Honolulu, Island of Oahu, Territory of Hawaii, for and in consideration of my Love and Affection for my Grand Sons George De La Nux, Jr., and Daniel De La Nux, and in further consideration of the sum of One Dollar ($1.00)to me in hand paid by my said Grand Sons, George De La Nux and Daniel De La Nux, the receipt whereof is hereby acknowledged, do hereby bargain, grant, sell Transfer and Convey unto my said Grand Sons George De La Nux and Daniel De La Nux, all and singular that certain piece or parcel of Land situate on Kamehameha IV Road, Kalihi, Honolulu, Island of Oahu, Territory of Hawaii, and being the same now occupied by me as my Home, together with the improvements thereon.

And also all and singular My Real and Personal property by me possessed and wheresoever situate.

To Have and to Hold the same unto my said Grand Sons George De La Nux and Daniel De La Nux, their heirs and assigns, together with all and singular the rights, privileges, rents and income thereof, Tenements, Hereditaments and Appurtenances Forever, Reserving however unto me, the said Rebecca Houghtailing, a Life Estate therein.

In Witness whereof I the said Rebecca Houghtailing have hereunto set my hand and seal this 10th day of June, A. D. 1905.

REBECCA HOUGHTAILING.

In presence of:

WILLIAM SAVIDGE. [360]

Territory of Hawaii,
County of Oahu,—ss.

On this 8th day of November, A. D. 1905, personally appeared before me Rebecca Houghtailing (W.), known to me to be the person described in and who executed the foregoing instrument who acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein set forth.

[Seal] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Entered of record this 2d day of July, A. D. 1910, at 9:18 A. M., and compared.

CHAS. H. MERRIAM,
Registrar of Conveyances. [361]

[Endorsements]: Circuit Court, First Circuit, Territory of Hawaii. Rebecca Houghtailing, vs. George De La Nux, Jr., and Daniel De La Nux. Bill of Complaint. E. No. 2090. Plaintiff's Exhibit "M." Filed Jun. 23, '19. Claus L. Roberts, Clerk. A. D. Larnach and R. W. Breckons, Attorneys for Plaintiff.

No. 1220. Rec'd and Filed in the Supreme Court, Sept. 16, 1919, at 8:55 o'clock A. M. Robert Parker, Jr., Assistant Clerk. [362]

Defendants' Exhibit No. 1.

E. No. 2090. Defendant's Exhibit One. Filed Jun. 17, '19. Claus L. Roberts, Clerk.

April 3d, 1917.

Mr. Breckons

Dear Sir

I wish to take this means of informing you that I have no further buisiness with you or to act for me in any legal matters whatsoever. If I am correctly informed you have been paid for your services and also you have done nothing more that I know of. So you will understand that I do not want your services any longer.

Hoping you will understand my letter

I am sincerely

REBECCA HOUGHTAILING.

Houghtailing. No. 1220. Rec'd and Filed in the Supreme Court, Sept. 16, 1919, at 8:55 o'clock A. M. Robert Parker, Jr., Assistant Clerk.

[Envelope:]

After 10 days, return to

Aiea, Hawaii.

[Stamped:] Aiea Apr 3 5 P. M 1917 H. Isls.

Mr. Breckons

Honolulu

Oahu

E. No. 2090. Defendants' Exhibit One. Filed Jun. 17, '19. Claus L. Roberts, Clerk. [363]

No. 1220. Rec'd and Filed in the Supreme Court,

Sept. 16, 1919, at 8:55 o'clock A. M. Robert Parker, Jr., Assistant Clerk.

Defendants' Exhibit No. 2.

KNOW ALL MEN BY THESE PRESENTS that I, REBECCA HOUGHTAILING, of Honolulu, City and County of Honolulu, Territory of Hawaii do hereby make, constitute and appoint G. F. De La NUX of Honolulu, aforesaid my true and lawful attorney for me and in my name, place and stead to demand, ask for, receive, and receipt for all money or monies which may be due to me for myself from my Guardian, and to do, act and perform in all things in and about the premises as and in the same manner as I might myself do if personally present.

HEREBY ratifying and confirming all that my said attorney in fact may do in and about the premises.

IN WITNESS WHEREOF I have hereto set my hand this fourteenth day of February, A. D. 1917.

REBECCA HOUGHTAILING.

Territory of Hawaii,
City and County of Honolulu,—ss.

On this fourteenth day of February, 1917, personally appeared before me Rebecca Houghtailing (widow), to me known and known by me to be the person described in and who executed the foregoing instrument, who acknowledged to me that she executed the same freely and voluntarily and for the uses and purposes therein set forth.

[Seal] WM. L. WHITNEY,
2d Judge First Circuit Court,

[Endorsements]: E. No. 2090. Defendants' Exhibit Two. Filed Jun. 17, '19. Claus L. Roberts, Clerk.

No. 1220. Rec'd and Filed in the Supreme Court, Sept. 16, 1919, at 8:55 o'clock A. M. Robert Parker, Jr., Assistant Clerk. [364]

In the Supreme Court of the Territory of Hawaii.

BILL FOR REFORMATION OF DEED.

No. 1220.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Plaintiff-Appellee,

vs.

GEORGE DE LA NUX, Jr., DANIEL DE LA NUX, GEORGE F. DE LA NUX, and LAHAPA DE LA NUX,
Defendants-Appellants.

Stipulation that Motion to Dismiss Appeal be Granted on Grounds Alleged in Motion.

IT IS HEREBY STIPULATED that the motion to dismiss defendants-appellants' appeal may be granted on the grounds alleged in said motion; that the parties stipulate that the record herein may be considered by the Court as if a writ of error had been sued out by the defendants-appellants forthwith after the dismissal of said appeal; and it is further stipulated that any questions of law that are open on such writ of error and said record may be considered

and decided by the Supreme Court.

The plaintiff-appellee reserves the right to object to the consideration of this reservation on the legal ground that a writ of error will not lie in the same cause after the dismissal of an appeal as heretofore stipulated, and if such objection would have caused a writ of error to be dismissed in the within cause, then all the defendants-appellants' questions of law shall be overruled.

ANDREWS & PITTMAN,
W. B. P.
Attorneys for the Defendants-Appellants.
A. D. LARNACH,
CASTLE & WITHINGTON,
Attorneys for Plaintiff-Appellee.

The within stipulation is hereby approved.

S. B. KEMP,
Associate Justice of the Supreme Court. [365]

[Endorsement]: Original. No. 1220. Circuit Court, First Circuit, Territory of Hawaii. Rebecca Houghtailing, Pltff.-Appellee, vs. George De La Nux, Jr. et al., Defdts.-Appellants. Stipulation. Rec'd and filed in the Supreme Court Oct. 2, 1919, at 9:55 o'clock A. M. Robert Parker, Jr., Assistant Clerk. Castle & Withington, Attys. for Pltff.-Appellee. [366]

In the Supreme Court of the Territory of Hawaii.

October Term, 1919.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

No. 1220.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,

vs.

GEORGE DE LA NUX, Jr., DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX.

Order Granting Motion to Dismiss Appeal and Dismissing Appeal.

The parties in the above-entitled cause by their respective attorneys having on the 2d day of October, 1919, filed their stipulation wherein they agree among other things that the motion heretofore filed herein by the petitioner to dismiss the appeal of respondents be granted, and said stipulation having been submitted to the Court on the 6th day of October, 1919;

NOW, THEREFORE, in pursuance of said stipulation it is hereby ordered that the said motion by the petitioner to dismiss the appeal of respondents in the above-entitled cause be and the same is hereby granted, and the appeal herein dismissed.

Dated, Honolulu, T. H., October 13, 1919.

By the Court:

[Seal] J. A. THOMPSON,
Clerk Supreme Court.

O. K.—KEMP.

[Endorsement]: No. 1220. Supreme Court, Territory of Hawaii. October Term, 1919. Rebecca Houghtailing, Through and by Frederick E. Steere, Her Guardian, vs. George De La Nux, Jr., et al. (Original.) Order Granting Motion to Dismiss Appeal and Dismissing Appeal. Filed October 13, 1919, at 11:30 A. M. J. A. Thompson, Clerk. [367]

In the Supreme Court of the Territory of Hawaii.
October Term, 1919.

No. 1220.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,

vs.

GEORGE DE LA NUX, Jr., DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX.

Opinion.

ERROR TO CIRCUIT JUDGE FIRST CIRCUIT.

HON W. H. HEEN, JUDGE.

Argued April 20, 1920. Decided May 5, 1920.

COKE, C. J., KEMP and EDINGS, JJ.

Appeal and Error.

By the provisions of section 2522, R. L. 1915, as amended by Act 44 S. L. 1919, this court is precluded, on a writ of error, from reversing any finding depending on the credibility of witnesses or the weight of evidence.

Equity—Laches—Statute of Limitations.

The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether under all the circumstances of the particular case complainant is chargeable with a want of due diligence in failing to institute suit before she did.

Appeal and Error—Sufficiency of Bill—Point Waived When not Seasonably Made.

A question not jurisdictional and which was not raised by demurrer nor in appellants' specifications of error nor in their brief comes too late to have consideration when presented for the first time during the oral argument of counsel. [368]

Opinion of the Court by COKE, C. J.

This is a suit in equity instituted by Rebecca Houghtailing, complainant-appellee, through Frederick E. Steere, her guardian, against George De La Nux, Jr., and Daniel De La Nux, respondents-appellants, to reform a deed. The deed in question purports to convey to the grantees therein named a certain piece of land situated on Kamehameha IV road, Kalihi, Oahu, with the improvements thereon, which property was at the time, and still is, occupied by the grantor as a home. There is a separate clause in the deed reading as follows: "And also all and singular my real and personal property by me possessed and wheresoever situate." It is this last clause which the appellee alleges was inserted in the deed through the fraud and deception of George F. De La Nux, the

father of the grantees, and which appellee now seeks to have eliminated from the deed by reformation thereof. By the terms of the deed the appellee reserved to herself a life estate in all the property conveyed. The grantees were minors at the time the suit was instituted, and their father, George F. De La Nux, was duly appointed their guardian *ad litem*. On the 1st day of December, 1918, George De La Nux, Jr., died, and the bill was amended by making George F. De La Nux and Lahapa De La Nux, father and mother, respectively, of the deceased grantee and his heirs at law, parties defendant. It appears that on the 11th day of April, 1916, Rebecca Houghtailing was declared a spendthrift owing to the use of intoxicating liquor and Frederick E. Steere was appointed the guardian of her person and estate. On the 19th day of April, 1917, the said guardian was ordered and directed by the judge of the probate court of the first judicial circuit to institute proceedings to bring about a reformation of the deed in accordance with the prayer of the bill filed herein, and on the 24th day of May, 1917, [369] suit was filed. The deed purports to have been signed by Rebecca Houghtailing on the 10th day of June, 1905, and acknowledged by her before a notary public on the 8th day of November, 1905. It was recorded in the office of the registrar of conveyances in Honolulu on the 2d day of July, 1910. The clause in the deed to which objection is made by appellee affects extensive and valuable real and personal property and it is alleged in the bill "That the insertion of the said provision in said deed conveying property other than

the said homestead was without the consent or knowledge, and was against the will of the said Rebecca Houghtailing, and was at the instigation, suggestion and connivance of the said George F. De La Nux, and was inserted therein with intent on the part of him, the said George F. De La Nux to deceive and defraud the said Rebecca Houghtailing, and with the intent on the part of him, the said George F. De La Nux, to have the said deed executed at a time when her condition, owing to the excessive use of intoxicating liquors, combined with her lack of knowledge of business and business affairs, would not permit her to appreciate the full force and effect of the instrument so to be executed by her; and that said instrument was executed at a time when the said Rebecca Houghtailing was under the influence of intoxicating liquors, and that in having the same executed at the said time, the said George F. De La Nux did intend to deceive and defraud the said Rebecca Hougtailing and did deceive and defraud her."

At the conclusion of the trial a decision was rendered by the Judge of the trial court wherein the evidence is extensively reviewed and it was found that Rebecca Houghtailing was at the time the deed in dispute was executed a person addicted to the extensive use of intoxicating liquor; that because of her habitual intemperance she was unable to attend to business affairs and for that reason was obliged to have others undertake the management of her [370] large estate; that also because of such habitual intemperance she was easily influenced by her son George; that she was deceived and defrauded by him

by being made to believe that the deed conveyed only the Kalihi home; that she succumbed to such deception and fraud because of the trust and confidence that she placed in her son George, and that the deed in question should be reformed by striking therefrom the words "and also all and singular my real and personal property by me possessed and wheresoever situate." A decree in accordance with the findings contained in the decision was made and entered.

The cause is brought here on error by the appellants. The errors relied upon as contained in appellants' opening brief are as follows: (1) That the Trial Judge erred in causing the said deed to be reformed on the ground of fraud and deception; (2) that the Trial Judge erred in deciding from the evidence that plaintiff was deceived and defrauded by George F. De La Nux and that by reason of such deception and fraud signed the deed in question; (3) that the Trial Judge erred in not dismissing the complaint on the ground of laches on the part of the plaintiff; (4) that the Trial Judge erred in not dismissing the complaint on the ground that said complaint did not contain the necessary and essential allegations to maintain this suit.

Specifications of error Nos. 1 and 2 present matters which necessarily depend upon the credibility of witnesses and the weight of evidence. There was evidence which affirmatively shows that Rebecca Houghtailing is an Hawaiian woman about fifty-six years of age; that she is without knowledge of business affairs and is, and for many years has been, unable to manage her estate; that for more than twenty

years last past she has been addicted to the excessive use of alcoholic liquors; that although she has other children and numerous grandchildren, some at least of [371] whom appear to have a greater claim to her affections and bounty than the two grantees named in the deed; that it was her intention and purpose to grant to the children of her son George her home situated on Kamehameha IV road, but that in the preparation of the deed George took advantage of her mental weakness and by fraud and deceit and without her knowledge or consent caused to be inserted in the deed the clause now complained of and which if permitted to stand would upon the death of Rebecca vest her entire estate in George's two children, their heirs or assigns. It is true this evidence was controverted by the testimony of witnesses introduced on behalf of the appellants but we are not on a writ of error permitted under section 2522, R. L. 1915, as amended by Act 44 S. L. 1919, to reverse the decree for any finding depending on the credibility of witnesses or the weight of evidence.

The third assignment presents as error the failure of the Trial Judge to dismiss the complaint on the ground of laches on the part of complainant. In this connection counsel for respondents argue that this is in fact a real action to recover possession of land and therefore the statute of limitations (Sec. 2651, R. L. 1915) applies. The section reads: "No person shall commence an action to recover possession of any lands, or make any entry thereon, unless within ten years after the right to bring such action first accrued."

But this is not an action to recover the possession of land but is a suit in equity to reform a deed. The complainant has at all times been, and still is, in possession of the property. The position of the parties has not changed since the date of the execution of the deed and of course no rights of third parties have intervened. We are of the opinion that the statute of limitations cannot be invoked to defeat the suit. [372]

In Rose v. Parker, 4 Haw. 593, this Court said: "It is urged that the plaintiffs are barred of this recovery by the statute of limitations. We understand that courts of equity not only act in obedience and in analogy to the statute of limitations in proper cases, but they also interfere in many cases to prevent the bar of the statute where it would be inequitable or unjust." This same question was before the Supreme Court of the United States in Townsend v. Vanderwerker, 160 U. S. 171. The Court in that case laid down the rule to be that "The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did." See, also, Gunton v. Carroll, 101 U. S. 426; Harris v. Ivey, 21 So. 422; Jones v. McNealy, 35 So. 1022.

The fourth assignment of error presents a general attack upon the entire bill for the reason that it does not contain the necessary allegations to maintain the suit. No particular defect in the bill is pointed out

and we are left to grope through the pleadings seeking as best we may for defects therein. Obviously these are matters which should have been taken advantage of on demurrer. The bill may not be a model of good pleading. It perhaps should have contained an averment specifying the time at which Rebecca discovered the fraud and a further averment in explanation of her failure to promptly seek relief against the fraud which she claims was perpetrated upon her. But in the absence of a demurrer the cause went to trial upon the bill and answers and whatever defects the bill contained were cured by the proofs submitted at the trial. It is in evidence that Mrs. Houghtailing became aware [373] of the fraud in 1911 but it was also shown that at that time and during the intervening period up to the date of the appointment of Mr. Steere as her guardian her mental condition was such as would excuse her inaction. In other words, all apparent laches were accounted for. Very shortly following Mr. Steere's appointment this suit was instituted.

In their oral argument before us counsel for appellants for the first time attempt to urge that there was no proper allegation or showing of a demand upon the appellants for the reformation of the deed prior to the institution of the suit. The record does show that there was a demand upon George F. De La Nux, the father of the grantees. But without determining whether a demand was necessary as a prerequisite to the suit, or if such demand was necessary whether the demand upon the natural guardian was sufficient, the point was not contained in the specifications of error

nor is it given the slightest mention in the briefs of appellants. It is not a jurisdictional question and comes too late to have consideration when presented for the first time during the oral argument of counsel.

The record herein presents a clear case where a confiding woman whose mind has been enfeebled by the excessive use of alcoholic liquor was by fraud, deceit and misrepresentation induced by her son to execute a deed to his children of all of her large estate to the exclusion of her other children and numerous grandchildren. The facts and circumstances divulged convinces us, as they convinced the Judge of the lower court, that Mrs. Houghtailing never had in mind the conveyance of any property other than her house and lot situated on Kamehameha IV road.

The decree appealed from ought to be, and therefore is, affirmed.

JAMES L. COKE.
S. B. KEMP.
W. S. EDINGS.

A. WITHINGTON and A. D. LARNACH (CASTLE & WITHINGTON and A. D. LARNACH on the Brief), for Complainant.

R. J. O'BRIEN (ANDREWS & PITTMAN and E. J. BOTTS on the Brief), for Respondents. [374]

[Endorsement]: No. 1220. Supreme Court, Territory of Hawaii. October Term, 1919. Rebecca Houghtailing, Through and by Frederick E. Steere, Her Guardian, vs. George De La Nux, Jr., Daniel De La Nux, George F. De La Nux and Lahapa De La

Nux. Opinion. Filed May 5, 1920, at 11:18 A. M. J. A. Thompson, Clerk. [375]

In the Supreme Court of the Territory of Hawaii, October Term.

ERROR TO CIRCUIT JUDGE, FIRST CIRCUIT.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,

vs.

GEORGE DE LA NUX, Jr., DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX.

Decree.

In the above-entitled cause, pursuant to the opinion of the above-entitled court filed May 5, 1920, the decree appealed from is affirmed.

Dated, Honolulu, T. H., May 13th, 1920.

By the Court:

[Seal] J. A. THOMPSON,
Clerk Supreme Court.

O.K.—COKE, C. J.

[Endorsement]: No. 1220. Supreme Court, Territory of Hawaii. October Term, 1919. Rebecca Houghtailing, Through and by Frederick E. Steere, Her Guardian, vs. George De La Nux, Jr., Daniel De La Nux, George F. De La Nux and Lahapa De La Nux. Decree. Filed May 13, 1920, at 10:50 A. M. J. A. Thompson, Clerk. [376]

In the Supreme Court, Territory of Hawaii.

CLERK'S MINUTES.

Vol. VI, Page 60.

Monday, October 6, 1919.

Court convened at 10:00 o'clock A. M.

October Term, 1919. October Session, 1919.

Present on the Bench: Hon. SAMUEL B. KEMP and Hon. WILLIAM S. EDINGS, JJ., and Hon. JAMES J. BANKS, Third Judge, Circuit Court, First Circuit, Sitting in the Place of Chief Justice JAMES L. COKE, Absent from the Territory.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

Vol. VI, Page 64.

1220
To Page 168.

REBECCA HOUGHTAILING, by and Through FREDERICK E. STEERE, Her Guardian,

vs.

GEORGE DE LA NUX, Jr., et al.

Present: A. WITHINGTON, for Complainant.

Minutes of Court—October 6, 1919—Order Dismissing Appeal.

The parties in the above-entitled cause having on the 2d day of October, 1919, filed herein their stipulation wherein they agreed that the appeal herein be dismissed; now on this day, the Court ordered that the appeal taken in the above cause be dismissed, and

the Court further ordered that the record remain in the case in accordance with the stipulation of counsel.

Vol. VI, Page 168.

Tuesday, April 20, 1920.

Court convened at 10:00 o'clock A. M.

Present: Hon JAMES L. COKE, C. J., Hon. SAMUEL B. KEMP and Hon. WILLIAM S. EDINGS, JJ.

ERROR TO CIRCUIT JUDGE, FIRST CIRCUIT.

1220 From Page 64, To Page 169.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,

vs.

GEORGE DE LA NUX, Jr., DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX. [377]

Minutes of Court—April 20, 1920—Hearing.

Appearances:

A. WITHINGTON, of the Firm of ROBERTSON, CASTLE & OLSON, and A. D. LARNACH, for Complainant-Appellee.

W. B. PITTMAN and R. J. O'BRIEN, of the Firm of ANDREWS, PITTMAN & O'BRIEN, for Respondents-Appellants.

The above-entitled case having been ordered set for this day for hearing, when said case was reached and was called at 11:16 A. M., Mr. Pittman opened to the Court and proceeded to read the stipulation of counsel filed October 2, 1919, relative to the record herein,

and then followed with a brief remark thereon.

Mr. Withington addressed the Court briefly on the stipulation.

The Court stated that the matter of the stipulation will be disposed of with the case.

At 11:23 A. M. O'Brien proceeded to state the case and then followed with his argument concluding at 11:49 A. M.

At 11:50 A. M. Mr. Withington commenced with his argument and continuing until 12:00 o'clock noon, when the court took a recess until 2 o'clock this afternoon.

Case continued until 2:00 o'clock this afternoon.

AFTERNOON SESSION.

Court reconvened at 2:00 o'clock P. M.

Present: Hon. JAMES L. COKE, C. J., Hon. SAMUEL B. KEMP and Hon. WILLIAM S. EDINGS, JJ.

ERROR TO CIRCUIT JUDGE, FIRST CIRCUIT.

1220 From Page 168, To Page 177.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,

vs.

GEORGE DE LA NUX, Jr., DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX.

Appearances:

A. WITHINGTON, of the Firm of ROBERTSON, CASTLE & OLSON, and A. D. LARNACH, for Complainant-Appellee.

R. J. O'BRIEN, of the Firm of ANDREWS, PITTMAN & O'BRIEN, for Respondents-Appellants.

When the Court reconvened and the above-entitled case was called Mr. Withington resumed with his argument, concluding at 2:14 P. M., and he was followed by Mr. Larnach, who concluded at 2:30 P. M. [378]

Mr. O'Brien replied concluding at 2:49 P. M.

Case submitted and taken under advisement.

Vol. VI, Page 177.

Wednesday, May 5, 1920.

ERROR TO CIRCUIT JUDGE, FIRST CIRCUIT.

1220 From Page 169.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,

vs.

GEORGE DE LA NUX, Jr., DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX.

Minutes of Court—May 5, 1920—Hearing (Resumed).

At 11:18 o'clock A. M. this day the Court handed

down its written opinion in the above-entitled case affirming the decree appealed from.

J. A. THOMPSON,
Clerk. [379]

In the Supreme Court of the Territory of Hawaii.

October Term, 1919.

DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX,
Plaintiffs in Error,

vs.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Defendant in Error.

Petition for Writ of Error and Supersedeas Returnable to United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice of the Supreme Court of the Territory of Hawaii:

Daniel De La Nux, George F. De La Nux and Lahapa De La Nux, plaintiffs in error in the above-entitled cause, deeming themselves aggrieved by the judgment of the Supreme Court of the Territory of Hawaii entered and filed on the 13th day of May, 1920, in the above-entitled cause, entitled "Rebecca Houghtailing, Through and by Frederick E. Steere, Her Guardian, vs. George De La Nux, Jr., Daniel De La Nux, George F. De La Nux and Lahapa De La Nux," come now by Andrews, Pittman & O'Brien, their attorneys, and hereby humbly petition said

Supreme Court of the Territory of Hawaii for an order allowing said plaintiffs in error to prosecute a writ of error and have the same allowed from the United States Circuit Court of Appeals for the Ninth [380] Circuit to said Supreme Court of the Territory of Hawaii under and according to the laws of the United States in that behalf made and provided, and that a transcript of the record, proceedings and documentary exhibits upon which said judgment was made, duly authenticated, may be sent to said United States Circuit Court of Appeals for the Ninth Circuit; and also that an order may be made by this Honorable Court fixing the amount of the bond which the said plaintiffs in error shall give and furnish upon the said writ of error, and that upon the filing of such bond, all proceedings in and relating to the subject matter in and of the said cause in the said Supreme Court of the Territory of Hawaii and in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, whether direct or ancillary thereto, be suspended and stayed until the determination of such writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

And in this behalf your petitioners show that the said judgment was rendered in an action at law and that the amount involved in said action, exclusive of costs, exceeds the value of $5,000.00.

WHEREFORE, your petitioners pray that a writ of error may issue out of this court to the end that the errors existing in the record may be corrected and the said judgment reversed, and judgment given to

the said plaintiffs in error and full and complete justice may be done in the premises.

Dated: Honolulu, T. H., June 10, 1920.

DANIEL DE LA NUX,
GEORGE F. DE LA NUX,
LAHAPA DE LA NUX,
Petitioners.

By ANDREWS, PITTMAN & O'BRIEN,
Their Attorneys. [381]

Territory of Hawaii,
City and County of Honolulu,—ss.

George F. De La Nux, being first duly sworn, deposes and says: That he is one of the plaintiffs in error in the above-entitled cause and is well acquainted with the matters in controversy in said cause, and that the amount involved in the said cause, exclusive of costs, exceeds the value of $5,000.00.

GEORGE F. DE LA NUX.

Subscribed and sworn to before me this 10th day of June, 1920.

[Notarial Seal] MINA D. CAIN,
Notary Public, First Judicial Circuit, Territory of Hawaii.

[Endorsement]: No. 1220. Supreme Court, Territory of Hawaii. Daniel De La Nux, et al., Plaintiffs in Error, vs. Rebecca Houghtailing, etc., Defendant in Error. Petition for Writ of Error and Supersedeas Returnable to U. S. Circuit Court of Appeals for the Ninth Circuit. Filed June 12th, 1920, at 10 minutes past 10:00 o'clock A. M. J. A. Thompson, Clerk. Andrews, Pittman & O'Brien, 37 Mer-

chant Street, Honolulu, T. H., Attorneys for Plaintiffs in Error. [382]

In the Supreme Court of the Territory of Hawaii.

October Term, 1919.

DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX,
Plaintiffs in Error,

vs.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Defendant in Error.

Assignments of Error on Return to Writ of Error Returnable to United States Circuit Court of Appeals for the Ninth Circuit.

Now come Daniel De La Nux, George F. De La Nux and Lahapa De La Nux, plaintiffs in error in the above-entitled cause, by Andrews, Pittman & O'Brien, their attorneys, and say that in the record and proceedings in the above-entitled cause in the Supreme Court of the Territory of Hawaii, and in the rendition of its final judgment therein, there are, and have intervened, manifest errors prejudicial to the said paintiffs in error, to wit:

I.

That the said Supreme Court erred in affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in said cause.

II.

That the said Supreme Court erred in not reversing

the said judgment of said Circuit Court and in deciding that [383] judgment should not be rendered in favor of the said plaintiffs in error and dismissing the bill of defendant in error.

III.

That the said Supreme Court erred in holding that a certain deed dated June 10, 1905, offered in evidence at the trial of said cause and marked Exhibit "F," should be reformed on the grounds of fraud and deception.

IV.

That the said Supreme Court erred in alleging that Rebecca Houghtailing was deceived and defrauded by George F. De La Nux and that by reason of such deception and fraud signed said deed marked Exhibit "F."

V.

That the said Supreme Court erred in sustaining the trial Judge in not dismissing the complaint on the ground of laches of which Rebecca Houghtailing, plaintiff, was guilty.

VI.

That the said Supreme Court erred in not rendering judgment for the plaintiffs in error on the ground that the complaint did not contain the necessary and essential allegations to maintain this suit.

VII.

That the said Supreme Court erred in not rendering judgment for the plaintiffs in error on the ground that the complaint failed to allege a demand and the proof failed to show a demand, upon the minor defendants.

VIII.

That the said Supreme Court erred in not rendering judgment for the plaintiffs in error on the ground that the [384] Circuit Court of the First Judicial Circuit failed to find upon the issues raised in pleading, to wit, the statute of limitations.

WHEREFORE the said plaintiffs in error pray that the errors aforesaid, and other errors appearing in the record of said Supreme Court in the said cause to the prejudice of the plaintiffs in error, the judgment of said Supreme Court be reversed, annulled and for naught esteemed, and that the said Supreme Court be ordered to reverse the said judgment entered in said Circuit Court and to order the said Circuit Court to enter judgment in favor of the plaintiffs in error as by them prayed, dismissing said complaint of the defendant in error, and for such other relief as may be just and proper in the premises, to the end that justice may be done in the premises.

Dated: Honolulu, T. H., June 10, 1920.

DANIEL DE LA NUX.
GEORGE DE LA NUX.
LAHAPA DE LA NUX.
Plaintiffs in Error.

By ANDREWS, PITTMAN & O'BRIEN,
Their Attorneys.

Service of a copy of the foregoing Assignments of Error is hereby acknowledged.

ALEXANDER D. LARNACH,
ROBERTSON, CASTLE & OLSON,
Attorneys for Defendant in Error.

[Endorsed]: No. 1220. Supreme Court, Territory of Hawaii. Daniel De La Nux, et al., Plaintiffs in Error, vs. Rebecca Houghtailing, etc., Defendant in Error. Assignments of Error on Return to Writ of Error Returnable to U. S. Circuit Court of Appeals, for the Ninth Circuit. Filed June, 12, 1920, at 10 minutes past 10:00 o'clock A. M. and issued for service. J. M. Thompson, Clerk.

Returned June 14, 1920, at 9:30 A. M. J. M. Thompson, Clerk.

In the Supreme Court of the Territory of Hawaii.

October Term, 1919.

DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX,
Plaintiffs in Error,

vs.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Defendant in Error.

Order Allowing Writ of Error Returnable to United States Circuit Court of Appeals and Supersedeas.

Upon reading and filing the foregoing petition for a writ of error, together with the assignment of errors presented therewith, alleged to have occurred in the judgment of this court and in the proceedings in the trial of said cause prior thereto,—

IT IS ORDERED that a writ of error be and the same is hereby allowed to the said Daniel De La

Nux, George F. De La Nux and Lahapa De La Nux, to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered in the above-entitled cause and the proceedings in the trial of said cause prior thereto, and that the amount of bond on said writ of error be, and the same is hereby fixed in the sum of Five Hundred Dollars ($500.00); and that upon the filing of said above-named plaintiffs in error of an approved bond in said amount, all further proceedings in said cause in the said Supreme Court of the Territory of Hawaii and the Circuit Court of the First [387] Judicial Circuit of the Territory of Hawaii, shall be stayed and suspended until the determination of such writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated Honolulu, T. H., June 12th, 1920.

[Seal] JAMES L. COKE,

Chief Justice of the Supreme Court of the Territory of Hawaii.

[Endorsement]: No. 1220. Supreme Court, Territory of Hawaii. Daniel De La Nux et al., Plaintiffs in Error, vs. Rebecca Houghtailing, etc., Defendant in Error. Order Allowing Writ of Error Returnable to U. S. Circuit Court of Appeals, and Supersedeas. Filed June 12, 1920, at 10 minutes past 10:00 o'clock A. M. J. A. Thompson, Clerk. Andrews, Pittman & O'Brien, 37 Merchant Street, Honolulu, T. H., Attorneys for Plaintiff in Error. [388]

In the Supreme Court of the Territory of Hawaii.

October Term, 1919.

DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX,

Plaintiffs in Error,

vs.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,

Defendant in Error.

Supersedeas and Cost Bond on Writ of Error Returnable to United States Circuit Court of Appeals.

KNOW ALL MEN BY THESE PRESENTS: That we, Daniel De La Nux, George De La Nux and Lahapa De La Nux, as principals, and Frank E. Richardson and D. F. Nicholson, as sureties, are held and firmly bound unto Rebecca Houghtailing, through and by Frederick E. Steere, her guardian, in the sum of Five Hundred Dollars ($500.00), to the payment whereof well and truly to be made, we do hereby jointly and severally firmly bind ourselves and our respective heirs, successors, executors and administrators.

THE CONDITION of this obligation is as follows:

WHEREAS, in an action heretofore pending in and before the Supreme Court of the Territory of Hawaii wherein said bounden principals were defendants, and obligee was plaintiff, the said Supreme Court did, on the 13th day of May, 1920, order,

render and enter a judgment of the Supreme Court wherein and whereby there was and is affirmed a certain judgment theretofore, to wit, on the 30th day of June, 1919, rendered and entered in and by the Circuit Court of the First Judicial Circuit of said Territory, in a cause wherein said [389] bounden principals were defendants, and said obligee was plaintiff, and which said judgment was in favor of said plaintiff.

AND WHEREAS, said bounden principals have applied for and are about to sue out a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to said Supreme Court of the Territory of Hawaii to the end that the judgment of the said Supreme Court, above described, may be reviewed by said United States Circuit Court of Appeals for the Ninth Circuit, and have taken or are about to take such other and further proceedings as may be necessary to obtain a review by the said United States Circuit Court of Appeals for the Ninth Circuit of the judgment last aforesaid;

NOW, THEREFORE, if the said bounden principals shall prosecute said writ of error to effect and shall answer all damages and costs if they fail to make their plea good, then the above obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the above-bounden principals and sureties have heretofore set their

hands and seals this 10th day of June, 1920.

DANIEL DE LA NUX,
By GEORGE F. DE LA NUX,
His Guardian.
GEORGE F. DE LA NUX,
LAHAPA DE LA NUX,
Principals.
D. F. NICHOLSON,
FRANK E. RICHARDSON,
Sureties. [390]

Territory of Hawaii,
City and County of Honolulu,—ss.

Frank E. Richardson and D. F. Nicholson, being first duly sworn, upon oath, each for himself, and not one for the other, deposes and says:

I am one of the sureties named in and who subscribed to the within and foregoing bond; I am a resident of the City and County of Honolulu, Territory of Hawaii, and a property holder in said Territory of Hawaii; I am worth in property within the Territory of Hawaii, subject to execution, the sum of One Thousand Dollars ($1,000.00) over and above all my just debts and liabilities.

D. F. NICHOLSON.
FRANK E. RICHARDSON.

Subscribed and sworn to before me this 10th day of June, 1920.

[Notarial Seal] MINA D. CAIN,
Notary Public, First Judicial Circuit, Territory of Hawaii.

The foregoing bond is hereby approved as to form and sufficiency, this 12th day of June, 1920.

[Seal] JAMES L. COKE,
Chief Justice of the Supreme Court, Territory of Hawaii.

[Endorsement]: No. 1220. Supreme Court, Territory of Hawaii. Daniel De La Nux et al., Plaintiffs in Error, vs. Rebecca Houghtailing, etc., Defendant in Error. Supersedeas and Cost Bond on Writ of Error. Filed June 12, 1920, at 10 minutes past 10:00 o'clock A. M. J. A. Thompson, Clerk. Andrews, Pittman & O'Brien, 37 Merchant Street, Honolulu, T. H., Attorneys for Plaintiffs in Error. [391]

In the Supreme Court of the Territory of Hawaii.

October Term, 1919.

DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX,
Plaintiffs in Error,

vs.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Defendant in Error.

Writ of Error to the Supreme Court of the Territory of Hawaii.

The United States of America,—ss.

The President of the United States to the Honorable Justices of the Supreme Court of the Territory of Hawaii, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Hawaii, before you, or some of you, between Rebecca Houghtailing, through and by Frederick E. Steere, her guardian, plaintiff, now defendant in error, and Daniel De La Nux, George F. De La Nux and Lahapa De La Nux, defendants, now plaintiffs in error, hath happened to the great damage of plaintiffs in error, as by their complaint appears:

We being willing that error, if any there hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of [392] Appeals for the Ninth Circuit, together with this writ, so that you have the same in said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States,

this 12th day of June, 1920.

[Seal] J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

The foregoing is hereby allowed this 12th day of June, 1920.

JAMES L. COKE,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of a copy of the foregoing Writ of Error is hereby acknowledged.

ALEXANDER D. LARNACH,
ROBERTSON, CASTLE & OLSON,
Attorneys for Defendant in Error. [393]

[Endorsed]: No. 1220. Supreme Court, Territory of Hawaii. Daniel De La Nux et al., Plaintiffs in Error, vs. Rebecca Houghtailing, etc., Defendant in Error. Writ of Error to the Supreme Court of the Territory of Hawaii. Filed June 12, 1920, at 10 minutes past 10:00 o'clock A. M. and issued for service. J. A. Thompson, Clerk.

Returned June 14, 1920, at 9:30 A. M. J. A. Thompson, Clerk. [394]

In the Supreme Court of the Territory of Hawaii.

October Term, 1919.

DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX,

Plaintiffs in Error,

vs.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,

Defendant in Error.

Citation on Writ of Error Returnable to United States Circuit Court of Appeals.

The United States of America,—ss.

To Rebecca Houghtailing, Through and by Frederick E. Steere, Her Guardian, GREETING;

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, within thirty (30) days after the date of this citation, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Daniel De La Nux, George F. De La Nux and Lahapa De La Nux are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief [395] Justice of the Su-

preme Court of the United States, this 12th day of June, 1920.

JAMES L. COKE,
Chief Justice, Supreme Court of the Territory of Hawaii.

[Seal] Attest: J. A. THOMPSON,
Clerk, Supreme Court of the Territory of Hawaii.

Due service of the within citation and receipt of copy thereof is hereby admitted this 14th day of June, 1920.

ALEXANDER D. LARNACH,
ROBERTSON, CASTLE & OLSON,
Attorneys for Defendant in Error. [396]

[Endorsed]: No. 1220. Supreme Court, Territory of Hawaii. Daniel De La Nux et al., Plaintiffs in Error, vs. Rebecca Houghtailing, etc., Defendant in Error. Citation on Writ of Error Returnable to U. S. Circuit Court of Appeals. Filed June 12, 1920, at 10 minutes past 10:00 o'clock A. M. and Issued for Service. J. A. Thompson, Clerk.

Returned June 14, 1920, at 9:30 A. M. J. A. Thompson, Clerk. [397]

In the Supreme Court of the Territory of Hawaii.
October Term, 1919.

DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX,
Plaintiffs in Error,

vs.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Defendant in Error.

Amended Praecipe for Transcript of Record on Writ of Error Returnable to U. S. Circuit Court of Appeals.

TO JAMES A. THOMPSON, Esq., Clerk of the Supreme Court of the Territory of Hawaii:

You will please prepare a transcript of a record in the above-entitled cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the writ of error heretofore issued by said Court, and include in said transcript the following pleadings, proceedings, opinions, judgments and papers on file in said cause, to wit:

1. Bill of complaint, filed May 24, 1917, and attached thereto as Exhibit "A" thereof, copy of deed of Rebecca Houghtailing (nee Mrs. P. C. A. De La Nux) to George De La Nux, Jr., and Daniel De La Nux, dated June 10, 1905).
2. Order appointing George F. De La Nux guardian *ad litem* of George De La Nux, Jr., and Daniel De La Nux, filed May 24, 1917.
3. Answer of defendants, filed September 20, 1917.
4. Replication by plaintiff, filed September 26, 1917. [398]
5. Stipulation that defendants need file no answer, but that the answer heretofore filed by George F. De La Nux as guardian *ad litem* of George F. De La Nux, Jr., and Daniel De La Nux, be considered the answer of George F. De La

Nux, and Lahapa De La Nux, etc., filed June 14, 1918.

6. Decision of the Circuit Court of the First Circuit, entered and filed June 30, 1919.
7. Decree of the Circuit Court of the First Circuit, entered and filed June 30, 1919.
8. Transcript of testimony.

PLAINTIFF'S EXHIBITS, viz.:

9. Exhibit "F"—Original deed by Rebecca Houghtailing (nee Mrs. P. C. A. De La Nux) to George F. De La Nux, Jr., and Daniel De La Nux, dated June 10, 1905.
10. Exhibit "I"—Letter dated Aiea, 1/26/16, by Geo. De La Nux to Mr. Schnack.
11. Exhibit "J"—Letter dated Aiea, 1/26/16, by Geo. De La Nux to Dear Mother.
12. Exhibit "K"—Letter dated Feb. 1, 1916, by Geo. F. De La Nux to Mr. Breckons.
13. Exhibit "L"—Unsigned letter dated Honolulu, T. H., Feb. 26, 1916, to Mr. George De La Nux, Aiea, Oahu.
14. Exhibit "M"—Bill of Complaint for reformation of deed, entitled In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers, in Equity, "Rebecca Houghtailing, Plaintiff, vs. George De La Nux, Jr., and Daniel De La Nux."

DEFENDANT'S EXHIBITS, viz.:

15. Exhibit "1"—Letter dated April 3, 1917, by Rebecca Houghtailing to Mr. Breckons, with envelope.

16. Exhibit "2"—General Power of Attorney, Rebecca Houghtailing to George F. De La Nux, dated 2/14/17.
17. Stipulation that the motion to dismiss defendants-appellants appeal may be granted, on the grounds alleged in sail motion, etc., filed October 2, 1919.
18. Order granting motion to dismiss appeal and dismissing appeal, filed October 13, 1919.
19. Opinion of the Supreme Court of Hawaii, rendered and filed May 5, 1920. (25 Haw. 438–445.)
20. Decree of the Supreme Court of Hawaii, entered and filed May 13, 1920.
21. Minutes of the Clerk of the Supreme Court. [399]
22. Petition for writ of error and supersedeas returnable to U. S. Circuit Court of Appeals, affidavit thereto attached, and order allowing said writ.
23. Assignment of errors.
24. Supersedeas and cost bond on writ of error.
25. Writ of error to Supreme Court of the Territory of Hawaii.
26. Citation, and acknowledgment of service thereon.

You will also annex*ed* to and transmit with the record the original writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, and citation with return of service, your return of the writ of error under the seal of the Supreme Court of the Territory of Hawaii and also your cer-

tificate under seal stating in detail the cost of the record and by whom the same was paid.

Dated: Honolulu, T. H., June 16, 1920.

ANDREWS, PITTMAN & O'BRIEN,
Attorneys for Plaintiffs in Error.

Service of a copy of the foregoing amended praecipe for transcript is hereby acknowledged.

ROBERTSON, CASTLE & OLSON,
Attorneys for Defendant in Error.

[Endorsement]: No. 1220. Supreme Court, Territory of Hawaii. Daniel De La Nux et al., Plaintiffs in Error, vs. Rebecca Houghtailing, etc., Defendant in Error. Amended Praecipe for Transcript of Record. Filed June 16, 1920, at 30 minutes past 3:00 o'clock P. M. J. A. Thompson, Clerk. Andrews, Pittman & O'Brien, 37 Merchant Street, Honolulu, T. H., Attorneys for Plaintiffs in Error. [400]

In the Supreme Court of the Territory of Hawaii.

October Term, 1919.

ERROR TO CIRCUIT JUDGE, FIRST CIRCUIT.

No. 1220.

REBECCA HOUGHTAILING, Through and by FREDERICK E. STEERE, Her Guardian,
Complainant,

vs.

GEORGE DE LA NUX, Jr., DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX,
Respondents.

Certificate of Clerk of the Supreme Court of the Territory of Hawaii to Transcript of Record and Return to the Writ of Error.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing writ of error and in obedience thereto, the original of which said writ of error is herewith returned, being pages 392 to 394, both inclusive, of the foregoing transcript of record, and in pursuance to the Amended Praecipe to me directed, a copy whereof is hereto attached, being pages 398 to 400, both inclusive, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 382, both inclusive, and pages 387 to 391, both inclusive, AND I DO HEREBY CERTIFY the same to be true, full and correct copies of the pleadings, exhibits, testimony, clerk's minutes, record, proceedings, opinions and decrees which are now on file and of record in the office of the clerk of the Supreme Court of the Territory of Hawaii, in the case entitled "Rebecca Houghtailing, Through and by Frederick E. Steere, Her Guardian, Complainant, versus George De La Nux, Jr., Daniel De La Nux, George F. De La Nux and Lahapa De La Nux, Respondents," Numbered 1220. [401]

I FURTHER CERTIFY that the original assignments of error, with acknowledgment of service thereof, being pages 383 to 386, both inclusive, and

the original citation on writ of error, with admission of service thereof, being pages 395 to 397, both inclusive, are attached to the foregoing transcript of record and herewith returned.

I ALSO CERTIFY that the cost of the foregoing transcript of record is $147.20, and that said amount has been paid by Messrs. Andrews, Pittman & O'Brien, attorneys for respondents-appellants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 29th day of June, A. D. 1920.

[Seal] JAMES A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii. [402]

[Endorsed]: No. 3519. United States Circuit Court of Appeals for the Ninth Circuit. Daniel De La Nux, George F. De La Nux, and Lahapa De La Nux, Plaintiffs in Error, vs. Rebecca Houghtailing, Through and by Frederick E. Steere, Her Guardian, Defendant in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed July 7, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3519

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DANIEL DE LA NUX, GEORGE F. DE LA NUX, and LAHAPA DE LA NUX,

Plaintiffs in Error,

vs.

REBECCA HOUGHTAILING, Through and By FREDERICK E. STEERE, Her Guardian,

Defendant in Error.

OPENING BRIEF OF PLAINTIFFS IN ERROR

Lorin Andrews, & Wm. B. Pittman,
Attorneys for Plaintiffs in Error.

No. 3519

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

DANIEL DE LA NUX, GEORGE F. DE LA NUX, and LAHAPA DE LA NUX,

Plaintiffs in Error,

vs.

REBECCA HOUGHTAILING, Through and By FREDERICK E. STEERE, Her Guardian,

Defendant in Error.

OPENING BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF THE CASE.

On the 24th of May, 1917, Rebecca Houghtailing, plaintiff, through and by Frederick E. Steere, her guardian, filed a bill of complaint in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, against George De La Nux, Jr., and Daniel De La Nux, defendants, for the reformation of a deed

executed by said plaintiff conveying to said defendants a certain piece or parcel of land situate on Kamehameha IV Road, Kalihi, Honolulu, and also her real and personal property wheresoever situate, with the reservation of a life interest to herself in all of said property. It appearing that the defendants were minors at the time the suit was instituted, their father, George F. De La Nux, was appointed their guardian *ad litem*. On the 1st day of December, 1918, while the suit was still pending, George De La Nux, Jr., one of the defendants, died; and this fact being called to the attention of the Court an order was made amending the bill of complaint by adding thereto as defendants the names of the father and mother of the deceased, as the heirs of the said George De La Nux, Jr., and they were thereby made parties defendant to the suit.

It further appears that on the 11th day of April, 1916, the said Rebecca Houghtailing on her own motion was declared a spendthrift within the meaning of the laws of the Territory of Hawaii, and Frederick E. Steere was appointed the guardian of her person and estate; and that he obtained an order of court as such guardian to institute legal proceedings against the defendants for the reformation of the deed aforesaid.

The trial of this cause came on before the Honorable William H. Heen, Third Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, on June 16, 17, 18, 19, 20 and 23, A. D. 1919, and at said trial evidence was adduced by Mrs. Hough-

tailing and other witnesses in her behalf to show that for many years (including the time at which she executed the deed in question) she had been a drinking woman, indulging continuously in the use of intoxicating liquors; and she further swore that she never intended to sign the deed in question. It was further proved that the said deed was signed by Rebecca Houghtailing on the 10th day of June, 1905, and acknowledged by her on the 8th day of November, 1905, and that at the time she signed said deed she was of about the age of 49 years. The testimony of the respondents shows that she had for some time prior to her signing said deed, wished to turn over her property to her son, George F. De La Nux, on account of the misconduct of his brothers, and upon his refusing to accept the same she had offered to turn it over to his children; that at various times and in front of various witnesses, after the execution of the deed she had admitted the execution of the same, sometimes expressing her regret and at other times expressing her perfect satisfaction with her act. It further appeared from the testimony of the attorney who drew the deed, A. G. Correa, that Mrs. Houghtailing had called upon him in person and alone and instructed him as to the contents of the deed, and that the deed was read and explained to her before being signed by her.

The Trial Judge decided on the 30th day of June, 1919, that the plaintiff at the time the deed in dispute was executed, was a person addicted to the excessive use of intoxicating liquors and that be-

cause of her habitual intemperance she was unable to attend to business affairs and was easily influenced by her son George; that she was deceived and defrauded by him by being made to believe that the deed conveyed only the Kalihi home; that she succumbed to such deception and fraud because of the trust and confidence she placed in said son. In accordance with said decision a decree was entered in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, dated June 30, 1919, wherein the deed in question was ordered reformed by striking therefrom the words: "And also all and singular my real and personal property by me possessed and wheresoever situate." From this decision and decree an appeal was taken to the Supreme Court of the Territory of Hawaii. And on May 5, 1920, said decree of the Circuit Court was affirmed by the Supreme Court of the Territory of Hawaii and the plaintiffs in error have obtained a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, assigning the following errors, to wit:

1. That the said Supreme Court erred in affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in said cause.

2. That the said Supreme Court erred in not reversing the said judgment of said Circuit Court and in deciding that judgment should not be rendered in favor of the said plaintiffs in error and dismissing the bill of defendant in error.

3. That the said Supreme Court erred in holding

that a certain deed dated June 10, 1905, offered in evidence at the trial of said cause and marked Exhibit "F," should be reformed on the grounds of fraud and deception.

4. That the said Supreme Court erred in alleging that Rebecca Houghtailing was deceived and defrauded by George F. De La Nux and that by reason of such deception and fraud signed said deed marked Exhibit "F."

5. That the said Supreme Court erred in sustaining the Trial Judge in not dismissing the complaint on the ground of laches of which Rebecca Houghtailing, plaintiff, was guilty.

6. That the said Supreme Court erred in not rendering judgment for the plaintiffs in error on the ground that the complaint did not contain the necessary and essential allegations to maintain the suit.

7. That the said Supreme Court erred in not rendering judgment for the plaintiffs in error on the ground that the complaint failed to allege a demand and the proof failed to show a demand, upon the minor defendants.

8. That the said Supreme Court erred in not rendering judgment ror the plaintiffs in error on the ground that the [384] Circuit Court of the First Judicial Circuit failed to find upon the issues raised in pleading, to wit, the statute of limitations.

ARGUMENT.

THERE WAS NOT SUFFICIENT EVIDENCE PRESENTED BY COMPLAINANT TO BASE ANY DECISION OR DECREE BY THE TRIAL JUDGE THAT THE DEED SHOULD BE REFORMED ON THE GROUND OF FRAUD OR DECEPTION. Assignments of error 1, 2, 3, 4; Trans., p. 403.

In an action brought to reform an instrument the burden of proof lies upon the persons seeking to reform the instrument, and especially in cases, as in the case at bar, where the matter has lain for fourteen years untouched and undisputed, the evidence should be so clear and overwhelming that there can be no question that it is the duty of the court to take affirmative action.

In Ruling Case Law, Vol. 23, at page 367, the sufficiency of evidence necessary to reform an instrument is discussed, and we take the liberty of quoting the entire paragraph here:

"SUFFICIENCY OF EVIDENCE. It seems to be generally agreed that much stronger and clearer evidence is required than in an ordinary suit for damages; that the high remedy of reformation is never granted on a probability; and that a mere preponderance of evidence is not sufficient, although it has been in a few instances that a decree reforming an instrument will not be reversed if there is a preponderance of evidence in support of the findings. These strict requirements relate not only to the mistake, the mutuality thereof and the fraud alleged but also to the real agreement which is alleged to have been made. It has been held that when the equity is

claimed as a defense to an action on the instrument, the opposing testimony of the plaintiff to such defense is conclusive, unless contradicted by two witnesses or one witness and corroborating circumstances equivalent to a second witness. In attempting to lay down general rules as to the quantity, quality and kind of evidence which must be adduced the courts have employed many and varying expressions. It is said that the proof must be 'very clear'; 'clear and satisfactory'; 'entirely clear and most satisfactory'; 'the clearest and most satisfactory'; 'entirely exact and satisfactory'; 'clear and convincing'; 'clear, unequivocal and convincing'; 'clear, satisfactory and convincing'; 'so clear as to establish the fact beyond cavil'; 'beyond reasonable controversy'; 'free from doubt'; and 'of that clear and convincing character which leaves no reasonable doubt'; 'such as to leave no reasonable doubt upon the mind of the court'; 'so clear as to leave the fact without the shadow of a doubt'; 'as much to the satisfaction of the court as if admitted'; 'clear, convincing and indubitable'; 'clear, precise and indubitable'; 'clear and satisfactory and perhaps beyond a reasonable doubt'; 'clear, precise and indubitable and of such weight and directness as to establish the facts alleged beyond a reasonable doubt.' Although some of the decisions seem to have adopted the rule that fraud must be proved beyond a reasonable doubt, neither as to the proof of fraud nor of mistake is so strict a rule established. Nor can it be said that there is any rule which requires that the proof of the fraud or mistake, when denied, must be as satisfactory as if the mistake were admitted. Remarks of such character form no rule of law to direct courts in dispensing justice. All the foregoing expressions of the courts as to the degree or quality of proof required indicate a universal agreement that an instrument shall not be reformed on loose, contradictory and unsatisfactory evidence—a settled determination that when a mistake or fraud is alleged, it must be clearly established by satisfactory proofs.

Whatever the form used to express the degree of proof required, the only question is: Does it satisfy the mind of the court? When the mind of a judge is entirely convinced upon any disputed question, whether of fact or law, he is bound to act on the conviction. Relief will not be denied merely because there is conflicting testimony, although it has been held that a direct conflict as to the mistake alleged is conclusive against a reformation. It has been doubted whether, as a general rule, a writing should be reformed on the unsupported testimony of the party asking its reformation. If the mistake is admitted by the other party, relief will be granted."

The reason of the rule requiring this high degree of proof is stated in *Patton vs. Potter,* 27 Ohio St. 84, where the court said:

"When the reformation of a written instrument is sought on the ground of mistake, the presumption is so strongly in favor of the instrument that the alleged mistake must be clearly made out by proofs entirely satisfactory, and nothing short of a clear and convincing state of facts showing the mistake will warrant the court to interfere with and reform the instrument. This principle rests upon the soundest reason and upon undisputed authority and if not adhered to by the courts or when plainly disregarded, if not enforced by reviewing courts, the security and safety reposed in deliberately written instruments will be frittered away and they will be left to all the uncertainties incident to the imperfections and 'slippery memory' of witnesses."

Instead of the trial judge acting on the presumption that the instrument was good, it seems that he has allowed the uncorroborated evidence of Mrs. Houghtailing that she was drunk and did not know what she was doing, to offset the clear and convinc-

ing evidence as related by many witnesses and coming from her own mouth, that she not only knew what she was doing, but that for some years after the execution of the deed did not wish or intend to change the same.

A short resume of the evidence in the case is hereby made for the purpose of showing that the overwhelming testimony showed that Mrs. Houghtailing was fully aware of what she had done; that there was no fraud and deception, and the pretense of drunkenness is now merely being used to enable her to undo what she then did, for the benefit of her drunken sons with whom she has since become reconciled and who are catering to her weaknesses:

Mrs. Houghtailing was only 49 years old when she signed the deed. (Trans., p. ~~29~~ 25.)

Told De La Nux not to record the deed as she did not want his brothers to know what she had done. (Trans., pp. 87, 109.)

Mrs. Houghtailing admits that she knew contents of deed either in 1911 or 1913. (Trans., pp. ~~99~~, 120.)

Admits she saw copy when deed was recorded in 1910. (Trans., p. 102.)

Admits she never spoke to George about the deed being wrong. (Trans., pp. 91, 120.)

Declares that she did not intend to give him all her property, but alleges there was no fraud or carelessness on her part. (Trans., p. 99.)

Admits that she supported both her sons, Charles and Henry, who, with their wives, were drunkards. (Trans., p. 103.)

Never had to support George or his family. (Trans., p. 103.)

Admits Henry was drinking all the time. (Trans., p. 103.)

Mollie Cockett, Mary Cullen and Agnes Robello testify Mrs. Houghtailing drunk most of the time. Mary Cullen testifies Henry and his wife drunk most of the time also. (Trans., pp. 139, 161.)

Agnes Robello admits Mrs. Houghtailing supported both her sons, Charles and Henry, and both were drunk most of the time. (Trans., pp. 166, 167.)

Henry De La Nux testifies he heard of deed made by his mother from Charles about 1916. Never spoke to George about it. Never worked except when he had to get more money for drink. (Trans., p. 174.) Mother always took care of him. (Trans., p. 181.)

Charles De La Nux admits mother told him about deed in 1908 or 1910. (Trans., p. 186.)

Never spoke to George about what his mother had said. (Trans., pp. 189, 190, 194.)

DEFENSE.

A. G. Correa, lawyer, testifies he was attorney for Mrs. Houghtailing for many years before signing of the deed. Drew deed under instructions of Mrs. Houghtailing. (Trans., p. 143.)

She was alone in his office and he took instructions from her only.

Deed was read and explained to her. (Trans., p. 145.)

She was perfectly sober. (Trans., p. 145.)

Geo. A. Richards, a friend of Mrs. Houghtailing, living on Kauai, testifies Henry told him that his mother had willed all her property to George and that she ought to have willed it to all of them and that Mrs. Houghtailing was present and admitted that she had deeded her property to George. This in 1916. Mrs. Houghtailing said, "Yes, I have willed the property to George." (Trans., p. 209.)

Mrs. Houghtailing at George's house later said in the presence of George, his wife, Mrs. Kaae and Makanai, that she had willed her property to George. (Trans., p. 211.)

Mrs. Edward C. Henry testifies she had lived with Mrs. Houghtailing for some time (seven or eight months). Said she had deeded her property to George and she was sorry, as she wanted to deed it to all of the boys. She was not intoxicated at the time. (Trans., p. 214.)

Remembers Henry, when drunk, quarreling with mother and asking why she gave all her property to George. She said, "Because you boys were mean to me." (Trans., p. 215.)

Mrs. Lucy Kauhane testifies that in 1899 she lived in Hawaii. Remembers Mrs. Houghtailing coming there to urge George to come down to Honolulu to live and she would support him. Said, "You are the favorite son; you need not work, mother has money to provide for us." (Trans., pp. 218, 219.)

Heard conversation at George's house before 1905 between George and Mrs. Houghtailing. Mrs. Hough-

tailing wanted to leave her property to George's eldest son. He said "No." After second child born she again urged it; he agreed. (Trans., p. 221.)

Mrs. Houghtailing gave as her reason that other sons abused her. (Trans., p. 221.)

Witness heard her say in 1917 she was glad she had given her property to George and his children. (Trans., p. 223.)

In 1902 or 1903, Mrs. Houghtailing wanted to give her property to George and his one child, and George said wait till the second child was born and then she said "Son, don't neglect it; don't let it go too long." George said he didn't want to grab it all. Mrs. Houghtailing replied other sons were not treating her right. (Trans., p. 224.)

Judge Whitney was Judge of Circuit Court in February, 1917. Mrs. Houghtailing consulted him. Had him draw up power of attorney for George to act as her attorney in fact. She was perfectly sober. Wanted Steere removed as guardian and George put in his place. (Trans., p. 232.)

Richard Westerbee and Charles Arnold, as employees of Honolulu Plantation, saw Mrs. Houghtailing many times living at George's house. She was always sober and seemed to love George's children. Jessie Makanai heard her say she liked George best; her other sons were stupid. (Trans., pp. 238, 239, 242, 245.)

Mrs. Kaae Haaeho knows Mrs. Houghtailing for many years; a sort of cousin of hers. She and her husband were visiting Mrs. Houghtailing in 1905—

about July. Mrs. Houghtailing told her she was going to try and break deed to George's children. Witness' husband said he would be witness for the children. Matter dropped. (Trans., p. 253.)

Witness asked Mrs. Houghtailing next day what she was talking about. Mrs. Houghtailing replied in the following conversation:

A. "Then you go out and get evidence for George." And he said: "Yes, for the truth, I am going to come on the stand for that boy," so that conversation was dropped right then and there. Finally, the next day my husband went down to Puuloa to search for another job. We were all alone at the house, we were around there talking over things, and I brought the conversation to her, and I said, "What about," and she got up, "about this deed to your 'Mopunas,'" "My big son," "Why, have you got another son?" "Yes, don't you know it, I have another keiki?" "No, I only know two, you always introduced me to the other two, you never told me you had another one." "Oh, yes, I have three, that is our keiki 'Haku' (speaking Hawaiian), called 'Lord of the family,'" so she started to tell me all about this, she had deeded to George's two sons all what she had, and in my question I says, "What about the other two keikis, Henry and Charley?" "Oh, she said, why, oh, you know what they are, they are mean and nasty to me; George is the best keiki, he treats me as a mother, and the other two know that, they don't treat me as a mother, abuse me as if I was nobody to them." "But I think you have done wrong, you

ought to give something to the other two boys." "Oh, plenty of time for that, I can fix that up some day or other, you never need mind meddling in my business." I said, "Of course not." And then the conversation was pau, she didn't bring it up until my husband died, then I saw an article in the papers that Steere was put under guardianship as a spendthrift and as a drunkard, so I went up early the next morning to her house. I saw her on the verandah, she greeted me, and I cried, and she said, "What are you crying for?" I said, "Oh I am, I feel hurt at heart." She says, "For what?" "The idea that you should go and allow yourself to be put on the spendthrift and a drunkard, a good family like yourself and mine be known in public that you are put under a spendthrift and drunkard." And she said, "That is nothing." I says, "Nothing." "Yes, nothing." I says, "How did you come to do this?" (Trans., p. 254.) "Oh, it is merely Mr. Steere put me up to this to break the deed to get back the property again." I says, "It is a very poor way," and she says, "So that I could get something for Henry and Charley." I says "There is lots of allowance you could make for the other two, but it is a disgrace to go into court and put yourself as a spendthrift, when I never knew Henry—put yourself as a spendthrift, and a drunkard, lose your own senses, you always a lady in your own house, a house that is always clean and tidy, a drunkard lives in shacks, that is what I call a drunkard," because I am talking to her, then she says, "Oh, don't be like that, people don't believe that

in court." "That will live in the court records from generation to generation." "Oh, no, it will be all over when the case is over." I said, "Nothing at all, no, whoever advised you advised you wrong." She says, "No," and I said, "It will be there from generation to generation." "Oh, that we will fix up bye and bye." And I said, "All right." (Trans., pp. 253-4-5.)

Mrs. Houghtailing told witness she made the deed of her own free will. (Trans., p. 255.)

Dan Holapu at George's house.—Mrs. Houghtailing told witness and his wife that she had given all her property to George's children because George would not take it. (Trans., p. 265.)

Mrs. Lahape De La Nux testifies that Mrs. Houghtailing wanted George to leave Hawaii and live with her. (Trans., p. 269.)

Mrs. Houghtailing wanted to deed all her property to George before 1905 and George wouldn't take it. (Trans., p. 270.)

Afterwards agreed to accept deed for children. (Trans., p. 272.)

Witness was present at lawyer's office, heard the deed read in Mrs. Houghtailing's presence and heard her say it was all right. (Trans., pp. 272, 273.)

Witness heard Mrs. Houghtailing (at interview when Larnach and Breckons came to their house to make demand) admit she deeded all her property to children. (Trans., p. 276.)

Mrs. Houghtailing came to their house after Breckons' interview and stated, "I know that I gave

you and my grandchildren this property and I want to stop this business. (Trans., pp. 277, 278.)

Stated she wanted George to be her guardian and wanted them to forgive her for starting suit. (Trans., p. 278.)

George De La Nux testifies his mother wanted him to come to Honolulu and live with her and that he would not have to work. (Trans., p. 296.)

Wanted to turn over all her property to her son. (Trans., p. 298.)

But that he would not agree on account of his brothers. Finally did agree that both children should get it. (Trans., p. 303.)

She kept sending for him to have the deed prepared, till finally he and his wife went with her to Correa's office. (Trans., p. 303.)

Had never seen Correa before in his life. (Trans., p. 303.)

Correa read deed to Mrs. Houghtailing. She said deed was all right. (Trans., p. 304.)

Mrs. Houghtailing then gave deed to witness and asked him not to record it. (Trans., p. 305.)

Did not record deed at his mother's request until 1910, when she wanted it changed, so he recorded it. (Trans., pp. 306-7.)

Mrs. Houghtailing wanted to make him her guardian. (Trans., p. 313.)

And took him to see Judge Whitney. (Trans., p. 318.)

It is respectfully submitted to the Court that from this evidence the trial judge should not only have

held that plaintiff did not sustain the burden of proof, but that it was clear that Mrs. Houghtailing at all times knew what she was doing in deeding her property to her grandsons.

In a suit to reform an instrument the proof of fraud or mistake must be indubitable, and the burden rests upon the person asserting the fraud or mistake to show its existence by testimony entirely plain and convincing beyond reasonable contradiction.

N. W. Mutual, etc., *v. Nelson,* 103 U. S. 549 (26 L. Ed. 438).

Graves v. Boston, etc., 6 U. S., 2 Cranch 444 (2 L. Ed. 332).

Howland v. Naone, 5 Haw. 308.

"Where a contract is sought to be avoided on the ground of surprise or mistake, the fact of such surprise or mistake must be either conceded or so clearly established as to be substantially without dispute."

Voazie v. Williams, 49 U. S.; 8 How. 157 (12 L. Ed. 1028).

THE TRIAL JUDGE ERRED IN NOT DISMISSING THE COMPLAINT ON THE GROUND OF LACHES ON THE PART OF PLAINTIFF. Assignments of error 5 and 8; Trans., p. 404.

The wording of the complaint was such that it was impossible to demur to the same on the ground of laches, as there was no allegation as to when Mrs. Houghtailing discovered the alleged fraud, and paragraph twelve of said complaint alleges:

"That thereafter, and upon discovery of the wrongful insertion in the said deed of the provision above referred to, and of the fraud and deceit which had been practiced upon her, the said Rebecca Houghtailing made demand upon the said George F. De La Nux that steps be taken to have the said deed corrected and reformed, in order that the same should carry out the intent of the said Rebecca Houghtailing, but that the said George F. De La Nux refused so to do. * * *" (Trans., pp. 306, 307.)

It would seem from this paragraph that immediately upon her ascertaining that she had deeded all her property to her grandsons she took steps to have the instrument revoked. The testimony, however, on the trial showed a far different state of affairs. Thus it appears that Mrs. Houghtailing executed the deed in question in 1905 and at no time did she take any steps in her own behalf to set it aside or modify its scope. Her failure to do so can not be excused on the basis of ignorance of the terms of the deed, because she admits that she knew full well its contents in 1911 or 1913 (Trans., pp. 99, 120) and there is very strong evidence that it was upon her sole and own instructions that the attorney prepared the conveyance (Trans., p. 143) in the first place. But even if we accept for the moment the hypothesis that the attorney did make a mistake (a presumption certainly contrary to the evidence, and contradicted by the attorney, George F. De La Nux and his wife) complete acquiescence of the terms of the deed on the part of Mrs. Houghtailing is shown. (See resume of evidence where she admits it to

George A. Richards, Mrs. Henry, Mrs. Kauhane, Mrs. Haaeho and Dan Holopu. (Trans., pp. 210-11.)

"The acquiescence in the written instrument may be implied from an unreasonable delay in applying for redress after getting notice or discovering a mistake," said the United States Supreme Court, in *Snell vs. Atlantic,* etc., 98 U. S. 85 (25 L. Ed. 52). See also *Jenks vs. Pawlowski,* 98 Mich. 110.

In the *Snell vs. Atlantic* case Supra, the Court goes on to say:

"It would be a serious defect in the jurisdiction in the courts of equity if they were without power to grant relief against fraud or mutual mistake in the execution of written instruments. Of course parol proof in all such cases is to be received with great caution, and where the mistake is denied, should never be made the foundation of a decree variant from the written contract, except it be of the clearest and most satisfactory character. Nor should relief be granted where the party seeking it has unreasonably delayed application for redress, or where the circumstances raise the presumption that he acquiesced in the written agreement after becoming aware of the mistake. Hence, in *Graves v. Marine Insurance,* Supra, this court declined to grant relief against an alleged mistake in the execution of a policy, partly because the complainant's agent had possession of the policy long enough to ascertain its contents, and retained it several months before alleging any mistake in its reduction to writing."

The doctrine thus expressed by the United States Supreme Court has been closely followed in practically every state. In the case of *Stevens v. Patton,* 86 Ky. 379, 121 Pac. 498, the husband conveyed to his wife in fee all his property, reserving a life interest

to himself. Shortly afterward the fact was called to the attention of both spouses that a mistake had been made, the husband having intended to give his wife a life interest only,—the fee reserved to himself. But they lived for two years without taking steps to have the correction made, and the court held they thereby completely ratified the deed in its form.

So, even assuming that Mrs. Houghtailing did not know the contents of the deed at the time she executed it, her own admissions are in the record that she did know the full purport of the deed later on and never sought to change it. The fact that she learned of the "mistake" and allowed it to stand shows an implied ratification or acquiescence therein such as would bar her a few years later, through her guardian, in succeeding in this suit.

PLEADINGS MUST AVER TIME FRAUD OR MISTAKE WAS DISCOVERED, AND GRANTOR WAS NOT GUILTY OF GROSS NEGLIGENCE.

A court of equity uniformly exercises its power to reform instruments with very great caution, and only does so when a proper case is made by the pleadings. The pleadings must show upon their face that the complainant is entitled to the relief sought, and if there has been a long delay in bringing the suit there must be allegations which negative the appearance of laches as well as gross negligence, and it is emphatically stated by no less authority than the United States Supreme Court that the pleadings must aver

the time when the fraud or mistake was discovered so that the defendant may be able to meet it:

"There must be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered and what the discovery is, so that the court may clearly see whether by the exercise of ordinary diligence the discovery might have been made before."

Stearns v. Page, 7 How. 819 (12 L. Ed. 928).

"When fraud is alleged as a ground to set aside a title, the statute does not begin to run until the fraud is discovered; and this is the ground on which complainant asks relief. But in such a case the bill must be specific in stating the facts and circumstances which constitute the fraud; and also as to the time it was discovered. This is necessary to enable the defendants to meet the fraud and the alleged time of its discovery. In these respects the bill is defective, and the evidence is still more so."

Moore v. Greene, 19 How. 69, 15 U. S. (L. Ed.) 533.

Nowhere in the bill in the case at bar is any suggestion given as to when the alleged fraud was discovered by Mrs. Houghtailing; and far from being specific on this point, it passes it over entirely, simply saying in paragraph twelve: "That thereafter and upon the discovery of the wrongful insertion in said deed of the phrase above referred to and of the fraud and deceit which had been practiced upon her, the said Rebecca Houghtailing made demand upon the said George F. De La Nux that steps be taken to have the said deed corrected and reformed," etc., but not a word as to the time of the alleged discovery.

Had the bill set forth the date of the discovery of the alleged fraud, defendants might have availed themselves of the statute of limitations. Moreover, there is nothing in the bill to account for the long delay in bringing this action, the deed having been executed in 1905 and this case instituted in May, 1917.

In *Del Campo vs. Camarillo,* 154 Cal. 659, speaking on the same subject the Supreme Court of that state said:

"The remaining points in support of the non-suit apply equally in favor of the defendants. The deed of plaintiffs which is attacked was made seven years before this action was begun. * * * In seeking relief against frauds occurring so long ago, and in asking the court to cancel the contract and deed which in itself implies a settlement of the wrongs inflicted by those frauds, the plaintiffs are required to allege a clear case and to prove it by satisfactory and convincing evidence. They must clearly show that they did not discover the existence of the alleged fraud until a reasonable time before the action was begun; that they proceeded promptly upon such discovery and that their failure to make the discovery sooner was not due to their own lack of diligence. All this must be shown not merely by a bare statement of the conclusions as we have stated them but by a detailed statement of the facts and circumstances which caused the ignorance which prevented an earlier discovery and which constitutes the diligence in seeking a discovery, including also a statement of all facts previously known to them tending to indicate the existence of the facts."

NO FINDINGS ON PLEA OF LACHES AND STATUTE OF LIMITATIONS. Assignments of error 5 and 8.

The defendant's answer in the court below contained a plea of the statute of limitations and laches. The court below failed to find upon that issue. The court found that the deed was signed by the complainant on the 10th day of June, 1905. In view of the fact that the defense of the statute of limitations was raised, the decision is contrary to law and contrary to the evidence, because there was no finding made upon one of the material issues of the case.

The lower court could not enter a decree reforming the deed without first making a finding that Rebecca Houghtailing, defendant in error, was not guilty of laches, but had prosecuted her action in seasonable time. The Supreme Court should have reversed the Circuit Court, as the Circuit Court could not render a decree which was not supported by its findings.

34 Cyc., Sub-division C, p. 997.

Section 2651 of the Revised Laws of Hawaii, 1915, provides as follows:

"TEN YEARS. No person shall commence an action to recover possession of any lands, or make any entry thereon, unless within ten years after the right to bring such action, first accrued."

Section 2633 of the Revised Laws provides as follows:

"SIX YEARS. The following actions shall be commenced within six years next after the cause of such action accrued, and not after:

"5. Special actions on the case for criminal conversation, for libels, or for *any other injury to the persons or rights of any, except as otherwise provided.*"

25 Cyc. 1025 contains the following:

"By analogy to the statute of limitations at law barring an action for the recovery of lands after the lapse of a specified period from the accrual of the right of action, the lapse of the same period is usually a bar in equity to the recovery of an equitable estate, or for the enforcement of a right cognizable only in equity. Moreover where equity exercises concurrent jurisdiction, it will consider itself bound by, and will apply to, the statute of limitation as statutes, rather than by analogy; and where the statute operates on the right so that the cause of action is extinguished or barred, the bar prevents its enforcement in equity. The rule is laid down that in those cases where the main ground of action is fraud or mistake, whereby defendant has attained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet if plaintiff alleges facts which show, as matter of law, that he is entitled to the possession of the property, and a part of the relief asked is that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred except by the statutory limitation barring such actions."

In *Louis et al. vs. Marshall et al.,* 8 Law. Ed. 197, the Supreme Court of the United States uses the following language:

"That a statute of limitations may be set up in defense in equity as well as at law, is a principle well settled. It is not controverted by the counsel for the complainants."

In *Farnan v. Crooks,* 26 Mass., 9 Pick. 212, fraud on the part of defendant does not prevent a statute of limitations from barring a suit in equity unless it be actual fraud which was concealed, and which the

party had no means of discovering till within six years before the filing of the bill.

In *Wilson v. Ivy,* 32 Miss. 233, the following appears:

"The statute of limitations commences running from the time of the commission of fraud, and not from the time when the injury occasioned by it to the plaintiff was established."

In *Hoffert v. Miller,* 86 Ky. 572, 5 S. W. 447, the following appears:

"A deed will not be set aside for fraud where it was executed more than 10 years before action was brought, during which time plaintiff was under age."

In *Francis v. Wallace,* 77 Iowa 373, 42 N. W. 323, the following appears:

"In an action to set aside a guardian's deed on the ground of fraud, the fraud is discovered within the meaning of the statute of limitations, when the deed was recorded." Sec. 2648, R. L.

When we examine the bill of complaint in the case at bar in the light of the doctrine expressed in the foregoing decision, the fact becomes very apparent that complainant has not made out a case by her bill such as would entitle her to the relief prayed for. There is nothing in the bill which shows any excuse for the years that elapsed from the making of the deed to the date when this action was commenced.

See also,

Barkley v. Hibernia, 21 Cal., A. 456.

Jefferson v. Rust, 128 N. W. 954, 149 Ia. 594.

NO DEMAND MADE ON THE DEFENDANT MINORS. Assignment of errors 1, 2, 3.

Before the within action could be instituted, a demand for reformation of the deed should have been made on the defendant minors. No such demand was alleged in the complaint, nor did the evidence show that any such demand was ever made. All of the authorities hold that a demand is a prerequisite and that suit cannot be instituted until the demand has been made.

34 Cyc., Sub-division B, p. 944.

In conclusion we respectfully submit that the trial court erred in the particulars herein mentioned, and that the decree should be reversed and reformation refused.

Dated, Honolulu, T. H., September 27, 1920.

Lorin Andrews, & Wm. B. Pittman,
Attorneys for Plaintiff in Error.

NO. 3519

In the United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX,

Plaintiffs-in-Error,

vs.

REBECCA HOUGHTAILING, through and by FREDERICK E. STEERE, her Guardian,

Defendant-in-Error.

BRIEF OF DEFENDANT-IN-ERROR.

A. G. M. Robertson,
A. L. Castle,
C. H. Olson,
W. A. Greenwell,
Arthur Withington,
A. D. Larnach,
Counsel for Defendant-in-Error.

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CITATIONS

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DANIEL DE LA NUX, GEORGE F. DE LA NUX and LAHAPA DE LA NUX,

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vs.

REBECCA HOUGHTAILING, through and by FREDERICK E. STEERE, her Guardian,

Defendant-in-Error.

No. 3519

BRIEF OF REBECCA HOUGHTAILING THROUGH AND BY F. E. STEERE, HER GUARDIAN—DEFENDANT-IN-ERROR.

STATEMENT OF THE CASE.

The defendant-in-error, Rebecca Houghtailing, is a part-Hawaiian woman sixty-four years old, being under guardianship as a spendthrift by decree of the Circuit Court of Hawaii dated April 12th, 1916. (Tr., p. 45.) She for twenty years previous to the trial in this case had been "a common drunk," or partially intoxicated every day, spending from $60 to $250 a month on liquor. (Tr., pp. 49, 131, 158, 179, 93.) All this time her affairs were in the hands of

an agent or trustee. (Tr., p. 61.) Her son, one of the plaintiffs-in-error, George De La Nux, had been taken by his grandparents when an infant to another island, never seeing his mother till he was seven years old, and until 1900, when he was twenty-four years of age, seeing her only two or three times. (Tr., pp. 293-295.) When he was twenty-one he knew she was of independent means. (Tr., p. 295.) In 1900 he went to work on a plantation and very seldom saw his mother after that. (Tr., pp. 298-300.) In 1905 he went with his mother to a lawyer's office and she signed the deed of gift sought to be reformed. The deed is dated June 10th, 1905; acknowledged November 8th, 1905, and recorded July 2nd, 1910. In the middle of the deed these are the words sought to be cancelled—

"and also all and singular my Real and Personal property by me possessed and wherever situate."

This deed is in the main a deed of a homestead to two minor children of said George F. De La Nux, reserving to the defendant-in-error a life estate (Tr., p. 10), and the judgment of the Supreme Court of the Territory of Hawaii affirms the decree of the Circuit Court cancelling said phrase on the ground that it was inserted by fraud. The defendant-in-error testified she did not know till 1914 or 1915 that the deed conveyed all her other property valued at Forty Thousand Dollars ($40,000). (Tr., p. 89.) Shortly afterwards, urged by one of her other sons, she engaged counsel to have the deed reformed. Pre-

vious to this suit a demand to have the deed reformed was made on George F. De La Nux, and he was accused of committing the fraud by his mother in the presence of counsel, which accusation he did not deny. George F. De La Nux was the natural guardian of the children (pp. 310-311, 363, Revised Laws of Hawaii, Sec. 2993). After this interview when his mother was very sick her son, George F. De La Nux, when he was "playing safe," drafted a letter for his mother, discharging her attorneys (Tr., p. 319), and later got her to give him a power of attorney.

The case is one in equity coming to this court by writ of error. An appeal in equity to the Supreme Court of Hawaii was dismissed (Tr., p. 385), and under the statute of Session Laws of Hawaii, 1919 (Act 44), the right to a writ of error in suits in equity is given, and this case was reviewed by the Supreme Court of the Territory of Hawaii. The questions of law are:

> Is the evidence on the whole case sufficient to justify the affirmance of the decree?
>
> Is there any evidence to justify the finding that the defendant-in-error was not guilty of laches?

The other assignment of error as to a demand is a matter of pleading which was not reserved or raised by the plaintiffs-in-error in the Supreme Court of the Territory of Hawaii.

ARGUMENT.

Laches are not to be charged against one in possession claiming ownership.

Ruckman v. Corey, 129 U. S. 387,

in which Mr. Justice Harlan says:

"Laches, the Supreme Court of Illinois has well said, cannot be imputed to one in peaceable possession of land for delay in resorting to a court of equity to correct a mistake in the description of premises in one of the conveyances through which the title must be deduced. The possession is notice to all of the possessor's equitable rights, and he needs to assert them only when he may find occasion to do so."

Schroeder v. Smith, 249 Ill. 574.

Harris v. Ivy, 114 Ala. 363.

Jones v. McNeally. 139 Ala. 378.

Bigelow on Estoppel, 6th Ed., p. 661.

Laches means not merely lapse of time, but that the complainant being competent, has knowingly slept on his rights to the injury of the defendant.

It should be borne in mind that this case is for the reformation of a deed of gift to take place *in futuro* for which no consideration was given, made by an incompetent woman upon whom a fraud was perpetrated, she keeping possession of all the property and making a claim to its absolute ownership as soon as informed of the deed, and the defendants have not been injured by any delay, but the situation remains the same as in 1905.

This court in the case of *London & San Francisco*

Bank v. Dexter Horton & Co., Bankers, et al., 126 Fed. 593, lays down the law in regard to laches as follows:

"No hard and fast rule has been laid down by the courts which can be said to govern all cases wherein the defense of laches is involved. The lapse of time which might induce the application of the doctrine is not a determined period, but depends upon the circumstances of the particular case. One principle pervades all cases involving the defense of laches, however, and that is, that not only must there be a seemingly unnecessary delay on the part of the plaintiff in bringing or prosecuting his action, but that by reason of some change in the condition or relations of the property or parties occurring during the period of delay, it would be inequitable to permit the claim of the plaintiff to be enforced. *Galliher v. Cadwell,* 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Halstead v. Grinnan,* 152 U. S. 412, 14 Sup. Ct. 641, 38 L. Ed. 495; *Wheeling Bridge & T. Co. v. Reymann Brewing Co.,* 61 U. S. App. 531, 90 Fed. 189, 32 C. C. A. 571. As defined in the case of *Demuth v. Bank,* 85 Md. 326, 37 Atl. 268, 60 Am. St. Rep. 322:

" 'Laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity * * * There must be a legal duty to do some act, a failure to do that duty, and attendant circumstances which cause prejudice to an adverse party, before the doctrine of laches can be successfully invoked.' "

In *Wallaston v. Tribe,* L. R. 9 Eq. 44, Lord Romilly said:

"Great stress was laid on the lapse of time but I think nothing of that because all the persons inter-

ested are in the same state now as they were then. If there had been any delay which had altered the state of matters that might have raised a question. There is nothing of the sort."

And the cases of—

Rose v. Parker, 4 Haw. 593;
Magoon v. Lord Engineering Co., 22 Haw. 327-349;
Lucas v. American-Hawaiian E. & C. Co., 16 Haw. 87,

adopt the same rule.

Northern Railroad Co. v. Boyd, 228 U. S. 421.
Townsend v. Vanderwerker, 160 U. S. 171.

The case most like this, and yet not so strong as this case, is *McIntyre v. Proyor,* 173 U. S. 38, where an ignorant woman allowed nine years to elapse, but in that case she had received a consideration therefor, and was not in actual possession. Moreover, there was no question about the lapse of four years.

Where the lapse of time is uncertain and there are disputed facts involving questions of excuse, of the time when the fraud was discovered, laches is a question of mixed law and fact to be found as a fact by the jury or the court under proper rules of law.

In this case the question of when Mrs. Houghtailing became aware of the fraud is not definite and the court could have found that she only became aware of it one year and a half previous to the suit.

Likewise her mental condition during that period is a question of fact to be passed upon as excusing delay. Consequently the finding for the complainant must be construed by the court as a finding of fact on the most favorable evidence for the complainant.

Gatling v. Newell, 9 Ind. 572.
Holbrook v. Burk, 22 Pick. 546.
Kingsley v. Wallace, 14 Main 57.
Mannahan v. Noyce, 52 N. H. 232.
Bigelow on Fraud, 1st Ed., p. 448.

No judgment or decree of the Territory's highest court can be reviewed by this court on a matter of fact alone.

Grayson v. Lynch, 163 U. S. 468.

In equity cases the Supreme Court of the Territory of Hawaii can find the fact as well as the law.

Godfrey v. Kidwell, 15 Haw. 526.

Cha Fook v. Lau Pui, 10 Haw. 308.

If Mrs. Houghtailing had died, then her heirs could set up this fraud in a defense to a writ of entry for possession.

So far as the personal property is concerned, there having been no delivery and no consideration, the gift fails upon her repudiation of the deed.

20 Cyc. 1195 cases.

Basye v. Basye, 152 Ind. 582.

This brings up the whole case both of the real and personal property. A deed of real property reserving a life estate to the grantor operates as a cove-

nant to stand seised to uses. In other words, in conveyance under the common law, delivery was necessary and an estate *in futuro* was only executed because of the covenant or contract to be enforced in a court of equity holding grantor a trustee to uses. It therefore is seen that this whole transaction depends upon whether the grantor in good conscience at the time of her death should be considered a trustee for the grantees. If the whole transaction is permeated with fraud, equity will not compel the conveyance.

The assignments of error I, II, III and IV are so evidently erroneous as to need no more than the statement at the beginning of this brief.

These assignments of error involve only questions of fact which are not to be reviewed by this court.

Grayson v. Lynch, Supra.

Matters of pleading which were not objected to either in the trial court or in the supreme court are waived.

3 Corpus Juris 778-779, notes 29, 30, 31.

As pointed out in the statement of the case, there was a demand upon the plaintiffs-in-error before suit was begun and the question of pleading was not raised in the lower court or in the Supreme Court in the assignments in error or in the plaintiffs-in-errors' brief. Opinion of Supreme Court (Tr., pp. 393-394).

The court by its finding for the complainant thereby made a finding that there were no laches and

there is no statute of limitations to actions in equity in Hawaii.

Kaikainahaole v. Allen, 14 Haw. 527.
Hilo v. Liliuokalani, 15 Haw. 507.
Maile v. Carter, 17 Haw. 49.
Warren v. Nahea, 19 Haw. 382.
Kipahulu Sugar Co. v. Nakila, 20 Haw. 620.

The statute of limitations of Hawaii in real actions is ten years, but an action in equity, founded on actual fraud, is not barred by a statute, and the giving of the relief is a finding there were no laches, as laches is not the finding of a single fact but an inference from other facts, which may include many different elements.

Snow v. Boston Blank Book Manufacturing Co., 153 Mass. 456.

A. G. M. Robertson,
A. L. Castle,
C. H. Olson,
W. A. Greenwell,
Arthur Withington,
A. D. Larnach,
Counsel for Defendant -in-Error.

1269 No. 3520

United States
Circuit Court of Appeals
For the Ninth Circuit.

RAINIER BREWING COMPANY, a Corporation,
Plaintiff in Error,

vs.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Counsel.

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[1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3713.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,
Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation,
Defendant.

Complaint.

Now comes plaintiff and makes this its complaint against the defendant herein:

I.

Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Oregon and engaged in the transportation of persons

*Page-number appearing at foot of page of original certified Transcript of Record.

and property as a common carrier and in that business operates and operated at the times hereinafter mentioned a line of steamships between San Francisco, California, and Flavel, Oregon. During said time plaintiff joined with carriers by rail between different states of the United States and filed and published tariffs and in other respects conformed to the interstate commerce law of the United States.

II.

Defendant is a corporation organized and existing under the laws of the State of Washington.

III.

On or about the 12th day of May, 1917, the defendant delivered to plaintiff at San Francisco, California, two carloads [2] of bottled beer with instructions to cause said shipments to be transported via its steamship line to Flavel, thence via the line of railway of the Spokane, Portland and Seattle Railway Company to Portland, and thence via the railway of the Northern Pacific Railway Company to Seattle and there to deliver said shipment to American Transfer Company for the purpose of distributing to the individual consignees of the beer included in said shipment. Said two carloads of beer were thereupon transported to Seattle by plaintiff and its connecting carriers by rail hereinabove referred to and were delivered by said Northern Pacific Railway Company to the individual consignee, whose name in each instance appeared upon each package of bottled beer included in said shipment.

IV.

Under and by virtue of the laws of the State of

Washington and of the United States relating to the importation of beer into the State of Washington, the said connecting carriers by rail of plaintiff upon receipt from plaintiff of the two carloads of beer were required to and did segregate said two carloads of beer into individual shipments, each shipment consisting of the package of beer marked and consigned to the individual consignee for whom it was intended; that thereupon said connecting carriers by rail of plaintiff in conformity to the requirements of law transported said two carloads of beer into the State of Washington and to the City of Seattle and there made delivery of said shipments as individual, less than carload shipments.

V.

That plaintiff and its connecting carriers by rail had theretofore duly published their certain tariffs and had filed the same with the Interstate Commerce Commission of the United States and had duly posted the same in all respects as required [3] by law, and that according to the said tariffs then and there in effect and uncanceled, the lowest freight rate applicable to the transportation of said two carloads of beer from San Francisco, California, to Seattle, Washington, via the said route was the sum of forty-eight cents per hundred pounds minimum of seventy-six cents on each individual shipment, and the total charge which plaintiff and its connecting carriers by rail were required by said tariffs to collect for the transportation of said two carloads of beer from San Francisco, California, to Seattle, Washington, was the sum of $2,041.54. Defend-

ant has actually paid on account of the charges for said transportation the sum of $425.57, and no more, and there is still due and owing from defendant the sum of $1,615.97, in order to complete the payment for said transportation required by the tariffs. Defendant at the time of making said shipment agreed to pay and undertook to pay all of the freight charges lawfully accruing for said transportation, but has paid no more than the sum of $425.57 on account thereof. No part of the balance due has been paid to plaintiff or to either of its connecting carriers by rail participating in said transportation.

VI.

Prior to the making of said shipment plaintiff had entered into an agreement with its connecting carriers by rail hereinabove named, by which it agreed to advance and pursuant to which it did advance to said connecting carriers by rail their respective charges for the portion of the transportation furnished by each of them, respectively, and by which each of said companies authorized plaintiff to collect from defendant the regular tariff charge for the entire transportation from San Francisco, California, to Seattle, Washington. Demand has been made by plaintiff on defendant for the payment of said balance and defendant has failed and refused and still fails and refuses to pay any part thereof, and the same is now due and owing [4] from defendant to plaintiff.

WHEREFORE, plaintiff prays for judgment against defendant for the sum of $1,615.97, with interest thereon from the time of the delivery of said

beer at Seattle, Washington, to wit, the 23d day of May, 1917, and with costs and its disbursements herein.

CAREY & KERR,
F. G. DORETY and
CHARLES A. HART,
Attorneys for Plaintiff. [5]

State of Oregon,
County of Multnomah,—ss.

I, W. Q. Davidson, being first duly sworn, depose and say that I am Secretary of Great Northern Pacific Steamship Company, plaintiff in the above-entitled action; that I have read the foregoing complaint, know the contents thereof, and that the same is true as I verily believe.

W. G. DAVIDSON.

Subscribed and sworn to before me this 31 day of July, 1917.

[Seal] M. BARGER,
Notary Public for Oregon.

My commission expires Oct. 5, 1920.

[Indorsed]: Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Aug. 3, 1917. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [6]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3713.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation, L. HEMRICH, President,

Defendant.

Answer and Counterclaim.

Now comes the defendant above named, and for answer to the complaint herein, says:

I.

That it admits the allegations contained in paragraph I thereof.

II.

That it admits the allegations contained in paragraph II thereof.

III.

That it admits the allegations contained in paragraph III thereof, except that delivery of the carloads of beer therein referred to was made as therein alleged, as to which defendant has no knowledge or information sufficient to form a belief, but alleges that, if delivery was so made, the same was done contrary to the provisions of the bill of lading under which said shipments moved.

IV.

Answering paragraph IV of said complaint, defendant denies each and every allegation therein contained, and alleges [7] that, if said carloads of beer were segregated and delivered as individual, less than carload shipments, as therein alleged, the same was done contrary to the provisions, requirements and agreements of the bill of lading under which said shipments were accepted for transportation and delivery and in misconception of the carriers' rights, duties and obligations in the matter.

V.

Answering paragraph V of said Complaint, defendant denies that the lowest freight rate applicable to the transportation of said two carloads of beer from San Francisco, California, to Seattle, Washington, via the said route, was the sum of 48 cents per hundred pounds with a minimum of 76 cents on each individual shipment, and that the total charge which plaintiff and its connecting carriers by rail were required by their tariffs to collect for said transportation was the sum of $2,041.54, or any other sum in excess of the sum of $425.57, which defendant paid upon the delivery of said shipments to plaintiff at San Francisco and which plaintiff then accepted as the total freight charges lawfully accruing on said shipments.

VI.

Answering paragraph VI of said complaint, this defendant alleges that it has no knowledge or information sufficient to form a belief as to the allegations therein contained, and therefore denies the same.

Further answering and by way of an affirmative defense, this defendant alleges:

I.

That on the 8th day of May, 1917, and again on the 12 day of May, 1917, defendant delivered to plaintiff at San Francisco, [8] California, a carload of bottled beer to be transported over the steamship line of plaintiff to Flavel, Oregon, thence over the Spokane, Portland & Seattle Railway to Portland, Oregon, and thence over the Northern Pacific Railway to Seattle, Washington, as through carload shipments; that the two carloads of beer so delivered to plaintiff were duly accepted and a bill of lading issued for each one of them, and that plaintiff thereupon undertook and agreed on behalf of itself and its connecting carriers aforesaid to transport the said carloads of beer to Seattle, Washington, and there to deliver to the American Transfer Company as the consignee named in said bills of lading.

II.

That the tariffs of plaintiff and the said connecting carriers, duly published and on file with the Interstate Commerce Commission, provided different rates for beer transported in carload and less than carload quantities; that the carload rate so published were applicable to shipments over a certain minimum weight per car, and that each one of the shipments in question exceeded the said minimum and was therefore entitled to the carload rate; that the carload rate on bottled beer at the time the said shipments moved, duly published and filed by said carriers as aforesaid, from San Francisco,

California, to Seattle, Washington, was 30 cents per one hundred pounds; that defendant, upon the delivery of the said carloads to plaintiff, paid to plaintiff freight charges on said shipments on the basis of the said carload rate of 30 cents per one hundred pounds, aggregating with certain toll charges added thereto the sum of $425.57, and that in consideration thereof the said plaintiff, on its own behalf [9] and on behalf of the said connecting carriers, undertook and agreed to transport said two carloads of beer to Seattle, Washington, as prepaid shipments, and there deliver the same to the American Transfer Company, without any further charge whatsoever.

III.

That said shipments consisted of numerous individual cases or packages of bottled beer, each of which bore a permit as required by the laws of the State of Washington and none of which contained more than the amount of beer authorized under the laws of the State of Washington to be transported under such a permit, and that the shipment of said packages in the aggregate as carload lots was not in violation of the laws of the State of Washington or of the United States.

For further answer and defense to plaintiff's complaint and as a counterclaim against plaintiff, this defendant alleges:

I.

That plaintiff and said connecting carriers unreasonably and negligently delayed the transportation of said carloads of beer, which caused great dissatisfaction among defendant's customers to whom

said beer was to be distributed and made it necessary for defendant to send out numerous printed notices and circulars, telegrams and letters, and entailed considerable extra correspondence and office labor, and that the expense incurred and damages suffered by defendant on account thereof was the sum of $93.40.

WHEREFORE, defendant prays that the complaint of plaintiff be dismissed and that it take nothing by this action; and that defendant have and recover from plaintiff the sum of $93.40 and its reasonable costs and disbursements herein incurred.

S. J. WETTRICK,
Attorney for Defendant. [10]

State of Washington,
County of King,—ss.

Charles W. Loomis, being first duly sworn, upon his oath deposes and says: That he is the Secretary of defendant herein and makes this verification for and on behalf of said corporation, being thereunto duly authorized; that he has read the foregoing answer and cross-complaint, knows the contents thereof and believes the same to be true.

CHAS. W. LOOMIS.

Subscribed and sworn to before me this 15th day of September, 1917.

[Seal] S. J. WETTRICK
Notary Public in and for the State of Washington, Residing at Seattle.

[Indorsed]: Answer and Counterclaim. Filed in the U. S. District Court, Western Dist. of Washing-

ton, Northern Division. Sept. 18, 1917. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [11]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3713.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation,

Defendant.

Reply.

Now comes plaintiff and makes this its reply to the answer and counterclaim of the defendant herein.

Plaintiff admits the making of the shipments of beer described in paragraph I of defendant's affirmative answer, and admits that said shipments were made as carload shipments; and defendant admits that the rate applicable to carload shipments was as stated in paragraph II of said affirmative answer. Defendant also admits that said shipments consisted of individual cases or packages of bottled beer, each of which bore a permit as required by the law of the State of Washington, and that none of said individual packages contained more than the amount of beer authorized under the laws of the State of Washington to be transported under such a permit; but plaintiff alleges that the shipments of such in-

dividual packages in the aggregate as carload lots was in violation of the laws of the State of Washington and of the United States. [12]

Except as herein admitted, plaintiff denies each and every allegation of defendant's affirmative answer.

For its answer to defendant's counterclaim herein, plaintiff denies each and every allegation thereof.

WHEREFORE plaintiff demands judgment as prayed for in its complaint.

CAREY & KERR,
F. G. DORETY and
CHARLES A. HART,
Attorneys for Plaintiff,

State of Oregon,
County of Multnomah,—ss.

I, E. Pearson, being first duly sworn, depose and say that I am Assistant Secretary of Great Northern Pacific Steamship Company, plaintiff in the above-entitled action; that I have read the foregoing reply, know the contents thereof, and that the same is true as I verily believe.

E. PEARSON.

Subscribed and sworn to before me this 5th day of October, 1917.

[Seal] G. C. FRISBIE,
Notary Public for Oregon.

My commission expires Aug. 4, 1920.

[Endorsed]: Reply filed in U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 19, 1917. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [13]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3713.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation,

Defendant.

Stipulation of Facts.

The parties agree that the following may be taken as the facts in this case, and upon this agreed statement of facts decision of the Court may be made.

I.

The plaintiff is a corporation organized under the laws of the State of Oregon, engaged at the time stated below in the transportation of property as a common carrier by water between San Francisco, California, and Flavel, Oregon. During said times through arrangements with Spokane, Portland and Seattle Railway Company and Northern Pacific Railway Company, under the interstate commerce laws of the United States, plaintiff accepted property at San Francisco for transportation via its water line and via said rail lines to Seattle, Washington.

II.

The defendant is a corporation organized and existing under the laws of the State of Washington.

In May, 1917, the Bavarian Brewing Company delivered to the plaintiff at Sioux Falls, South Dakota, a carload of beer. Plaintiff's agent, who was authorized to receive the beer, signed a receipt for the car, but refused to unload it, claiming that the beer was unfit for use. The car was then sent back to Yankton, where it was unloaded by the defendant. [1] Plaintiff's agent testified that he had refused to receive the beer because it was sour and unfit for use. He further testified that he had notified the defendant's agent of this fact. Defendant's agent denied that he had been so notified. The jury returned a verdict for the defendant, and plaintiff appeals.

[2]

Plaintiff's counsel has argued that the court erred in refusing to give certain instructions requested by him. We have examined the instructions given by the court, and we think they fairly and correctly stated the law applicable to the case. The court instructed the jury that if they found that the beer was unfit for use when delivered, and that plaintiff's agent refused to receive it for that reason, and that defendant's agent was notified of such refusal, then the verdict should be for the plaintiff. The court also instructed the jury that if they found that the beer was not unfit for use, or that plaintiff's agent did not refuse to receive it for that reason, or that defendant's agent was not notified of such refusal, then the verdict should be for the defendant. These instructions were clear and correct, and we think the jury could not have been misled by them.

IV.

Plaintiff Steamship Company transported the two shipments of beer on one of its steamers to Flavel, at which place they were transferred to freight cars for transportation over the Spokane, Portland and Seattle Railway to Portland, Oregon, where the shipments were to be delivered to the Northern Pacific Railway Company for transportation to Seattle. At and prior to the time of the shipment Spokane, Portland and Seattle Railway Company was operating a special freight service in connection with the [15] steamship line of the plaintiff Steamship Company, and less than carload shipments were commonly loaded into merchandise cars at Flavel and handled in bulk until arrival at Portland or at some other point at which distribution could be begun. Defendant's two shipments were placed in merchandise cars of this kind for transportation to Portland, at which place they were to be delivered to the Northern Pacific Company for transportation to destination. Thereafter and prior to the delivery of said shipments to the Northern Pacific Railway Company at Portland, the latter company refused to accept said shipments as carload shipments, being of the opinion that under the laws of the State of Washington, the beer could not be transported into Washington in carload lots, and said Spokane, Portland and Seattle Company, being also of the opinion that the shipments could not be so transported into Washington as carload shipments, rebilled the two carload shipments at Portland and segregated them into individual less than carload shipments, each pack-

age constituting one shipment, and delivered the shipments in that manner to the Northern Pacific Railway Company, which company transported the same under said rebilling to Seattle where delivery of the individual packages was made to the persons whose names appeared on the permits attached thereto, or upon their order. No claims for any additional charges were made upon the different individuals when the packages were delivered.

V.

One of the cars contained 1,109 packages, weighing 60,891 pounds, and the other 1,456 packages, weighing 79,798 pounds, the weight of each car exceeding the carload minimum named in the tariff. The rates applicable to the shipments were on file with the Interstate Commerce Commission and were combination rates based upon Portland. The through carload [16] rate from San Francisco to Portland was 15¢ per hundred lbs., and from Portland to Seattle 15¢, making the combination carload rate 30¢ per 100 lbs., which is the rate paid on said shipments.

The through less than carload rate from San Francisco to Portland was 25¢ per 100 lbs., with a minimum of 50¢ on a single shipment, and from Portland to Seattle 23¢ with a minimum of 25¢ for a single shipment. If the said shipments could not lawfully have been transported into the State of Washington as carload shipments and delivery made to the Transfer Company and plaintiff is entitled to charge the less than carload rates for the entire transportation of said shipments, the total charges due plaintiff and its connecting carriers are $1,927.27 and

plaintiff is entitled to recover the difference between the sum and the charges based on the carload rates of $425.57 paid at the time of delivery to plaintiff, or the sum of $1,501.70.

VI.

Prior to the making of said shipment plaintiff had entered into an agreement with its connecting carriers by rail hereinabove named, by which it agreed to advance and pursuant to which it did advance to said connecting carriers by rail their respective charges for the portion of the transportation furnished by each of them, respectively, and by which each of said companies authorized plaintiff to collect from defendant the regular tariff charge for the entire transportation from San Francisco, California, to Seattle, Washington.

Dated March 22, 1920.

CAREY & KERR,
C. A. HART,
Attorneys for Plaintiff,
S. J. WETTRICK,
Attorney for Defendant.

[Indorsed]: Stipulation of Facts. Filed in the United States *Dist. of* Washington, Northern Division. June 7, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [17]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3713.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation,

Defendant.

Judgment.

The above-entitled action came on for trial June 7, 1920, plaintiff appearing by its attorney, Charles A. Hart, and defendant appearing by its attorney, S. J. Wettrick, and it appearing to the Court that an agreed statement of all of the facts in this case duly signed by the parties had theretofore been filed and that the parties had stipulated that the case may be submitted and decided by the Court upon the said agreed statement of facts, and that a jury had been duly waived by said parties; and the Court having concluded as a matter of law from said statement of facts that plaintiff is entitled to judgment, it is now

ORDERED AND ADJUDGED that plaintiff have judgment against the defendant for the sum of fifteen hundred one and 70/100 ($1501.70) dollars with interest from June 7, 1920, together with the sum of $100.65 costs heretofore taxed in favor of plaintiff and against defendant in the Circuit Court

of Appeals for the Ninth Circuit, as appears from the mandate heretofore entered in this action, and with the sum of $20.45 costs and disbursements duly taxed and allowed in this court.

DONE in open court this 18th day of June, 1920.

EDWARD E. CUSHMAN,
District Judge.

[Indorsed]: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 18, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

In the District Court of the United States for the Western District of Washington.

No. 3713.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

The Rainier Brewing Company, defendant above named, respectfully shows:

That on June 18, 1920, a final judgment was entered in the above-entitled cause against defendant and in favor of plaintiff, and said defendant feeling itself aggrieved by said judgment now peti-

tions this court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided for the correction of errors so complained of and herewith assigned, and that an order be made fixing the amount of the bond which the defendant shall give and furnish upon said writ of error.

S. J. WETTRICK,
Attorney for Defendant.

[Indorsed]: Petition for Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. June 18, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3713.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation,

Defendant.

Assignment of Error and Prayer for Reversal.

Now comes the above-named defendant, Rainier

Brewing Company, and says that in the record and proceedings of the above-entitled cause and in the rendition of judgment therein manifest error has been committed to the prejudice of said defendant in this:

That the learned Court erred—

1. In concluding as a matter of law from the statement of facts upon which this cause was submitted for decision that plaintiff is entitled to judgment and in granting and entering judgment in favor of plaintiff and against defendant.

2. In failing to enter judgment of dismissal of this action and for costs and disbursements in favor of defendant and against plaintiff.

WHEREFORE, defendant prays that the said judgment be reversed and an order entered dismissing said action, with costs to the defendant.

S. J. WETTRICK,
Attorney for Defendant.

[Indorsed]: Assignment of Error and Prayer for Reversal. Filed in the United States District Court, Western District of Washington, Northern Division, June 18, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [20]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3713.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error and Fixing Bond.

Upon motion of S. J. Wettrick, attorney for defendant, Rainier Brewing Company, in the above-entitled cause, upon the filing of petition on writ of error and assignments of error;

IT IS HEREBY ORDERED that a writ of error as prayed for in said petition be allowed and that the amount of the bond to be given by defendant, Rainier Brewing Company, upon said writ of error be and the same is hereby fixed at the sum of seventeen hundred fifty ($1750.00) dollars.

Dated this 18th day of June, 1920.

EDWARD E. CUSHMAN,
District Judge.

[Indorsed]: Order Allowing Writ of Error and Fixing Bond. Filed in the United States District Court, Western District of Washington, Northern Division. June 18, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3713.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, Rainier Brewing Company, a corporation, as principal, and the United States Fidelity and Guaranty Company, a corporation, duly organized under the laws of the State of Maryland, as surety, are held and firmly bound unto the plaintiff in the above-entitled cause for the sum of Seventeen Hundred Fifty ($1750.00) Dollars, for the payment of which well and truly to be made the undersigned bind themselves, and each of them, jointly and severally, and their successors, representatives and assigns respectively, firmly by these presents.

SEALED with our seals and dated this 18th day of June, 1920.

WHEREAS, the above-named defendant, Rainier Brewing Company, has sued out a writ of error in the United States Circuit Court of Appeals for the

Ninth Circuit to reverse the judgment entered in the above-entitled action,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named Rainier Brewing Company shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make good said plea, then this obligation shall be void; otherwise to remain in full force and effect.

[Seal] RAINIER BREWING COMPANY,
By W. G. COLLINS,
Vice-Pres.
P. F. GLASER,
Secretary.

UNITED STATES FIDELITY AND GUARANTY CO.
By C. H. CAMPBELL,
Attorney in Fact. [22]

The foregoing bond is hereby approved this 18th day of June, 1920.

EDWARD E. CUSHMAN,
District Judge.

[Indorsed]: Bond on Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. June 18, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3713.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation,

Defendant.

Praecipe for Preparation of Transcript of Record Upon Writ of Error.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in this cause for the purpose of transmission to the United States Circuit Court of Appeals for the Ninth Circuit with the writ of error in this cause, said transcript of the record to consist of the following:

1. Complaint.
2. Answer and counterclaim.
3. Reply.
4. Stipulation of facts (agreed statement of facts).
5. Judgment.
6. Petition for writ of error.
7. Assignment of error and prayer for reversal.
8. Order Allowing writ of error and fixing bond.
9. Bond on writ of error.
10. Writ of error.

11. Citation on writ of error.
12. Acceptance of service.

We waive the provisions of the act approved February 13, 1911, and request that you forward typewritten transcript to the Circuit Court of Appeals for the Ninth Circuit for printing as provided under Rule 105 of this court.

S. J. WETTRICK,
Attorney for Defendant. [24]

[Indorsed]: Praecipe for Preparation of Transcript of Record *of Record* upon Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. June 23, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [25]

United States District Court, Western District of Washington, Northern Division.

No. 3713.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 25, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said writ of error herein from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [26]

Clerk's Fee (Sec. 28 R. S. U. S.) for making record, certificate or return, 50 folios at 15¢ $7.50
Certificate of clerk to transcript of record—4 folios at 15¢ ..... .60
Seal to said certificate ..... .20

I hereby certify that the above cost for preparing and certifying record amounting to $8.30 has been paid to me by counsel for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause, together with original acceptance of service.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 8th day of July, 1920.

[Seal] F. M. HARSHBERGER,
Clerk U. S. District Court. [27]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3713.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America to the Honorable, the Judge of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you between Great Northern Pacific Steamship Company, plaintiff, and Rainier Brewing Company, defendant, a manifest error hath happened to the great damage of the said defendant, Rainier Brewing Company, as by its complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the city of San Francisco, in the State of California, within thirty (30) days from the date hereof, in the said Circuit Court of Appeals to be then [28] and there held, to the end that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 18th day of June, in the year of our Lord one

thousand nine hundred and twenty.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court for the Western District of Washington, Northern Division.

The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN,
District Judge. [29]

[Endorsed]: No. 3713. In the District Court of the United States, for the Western District of Washington, Northern Division. Great Northern Pacific Steamship Company, a Corporation, Plaintiff, vs. Rainier Brewing Company, a Corporation, Defendant. Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 18, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [30]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3713.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation,

Defendant.

Citation on Writ of Error.

United States of America,
District of Washington,—ss.

To Great Northern Pacific Steamship Company, a Corporation, GREETING:

WHEREAS, Rainier Brewing Company has petitioned for and an order has been made allowing a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment rendered in the above-entitled court in your favor and has given the security required by law and the order of this Court;

You are hereby cited and admonished to be and appear before the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from the date hereof, to show cause, if any there be, why the errors complained of in said judgment should not be corrected and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand at Seattle, in said District, this 18th day of June, 1920.

[Seal] EDWARD E. CUSHMAN,
Judge. [31]

[Endorsed]: No. 3713. In the District Court of the United States, for the Western District of Washington, Northern Division. Great Northern Pacific Steamship Company, a Corporation, Plaintiff, vs. Rainier Brewing Company, a Corporation, Defendant. Citation on Writ of Error. Filed in the United States District Court, Western District of

Washington, Northern Division. Jun. 18, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [32]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3713.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation,

Plaintiff,

vs.

RAINIER BREWING COMPANY, a Corporation,

Defendant.

Acceptance of Service.

Due service of the petition for writ of error, assignment of error and prayer for reversal, order allowing writ of error and fixing bond, bond on writ of error, writ of error, citation on writ of error and praecipe for preparation of transcript of record in the above-entitled cause is hereby acknowledged by receipt of true copies thereof this 18th day of June, 1920.

CAREY & KERR and
C. A. HART,
Attorneys for Plaintiff. [33]

[Endorsed]: No. 3713. In the District Court of the United States for the Western District of Washington, Northern Division. Great Northern Pacific

Steamship Company, a Corporation, Plaintiff, vs. Rainier Brewing Company, a Corporation, Defendant. Acceptance of Service. Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 23, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 3520. United States Circuit Court of Appeals for the Ninth Circuit. Rainier Brewing Company, a Corporation, Plaintiff in Error, vs. Great Northern Pacific Steamship Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed July 12, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3520

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAINIER BREWING COMPANY, a corporation,
Plaintiff in Error,

vs.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a corporation,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Brief for Plaintiff in Error

S. J. WETTRICK,
Arctic Building,
Seattle, Washington,
Attorney for Plaintiff in Error

CHARLES A. HART and
CAREY & KERR,
Yeon Building,
Portland, Oregon,
Attorneys for Defendant in Error

PRESS OF PLINY L. ALLEN CO., SEATTLE

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAINIER BREWING COMPANY, a corporation,
Plaintiff in Error,

vs.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a corporation,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Brief for Plaintiff in Error

STATEMENT OF THE CASE.

This case was previously before this Court on writ of error by the Steamship Company to review the judgment of the court below sustaining the motion of the Brewing Company for judgment on the pleadings and dismissal of the action. The decision reversing and remanding the case is reported in 255 Fed. 762.

Upon remand the case was submitted for decision by the District Court upon agreed facts (Tr. pp. 13-17) which for the convenience of the Court are here set forth.

STIPULATION OF FACTS

I.

The plaintiff is a corporation organized under the laws of the State of Oregon, engaged at the time stated below in the transportation of property as a common carrier by water between San Francisco, California, and Flavel, Oregon. During said times through arrangements with Spokane, Portland and Seattle Railway Company and Northern Pacific Railway Company, under the interstate commerce laws of the United States, plaintiff accepted property at San Francisco for transportation via its water line and via said rail lines to Seattle, Washington.

II.

The defendant is a corporation organized and existing under the laws of the State of Washington.

In May, 1917, defendant Brewing Company delivered to plaintiff at San Francisco, two carloads of beer for transportation over the route mentioned to Seattle, where they were to be delivered to the American Transfer Company, which was the consignee named in the bills of lading. Said shipments were accepted by the Steamship Company and shipped from San Francisco as two carload shipments, bills of lading issued accordingly and freight charges prepaid on the basis of the carload rates in the sum of $425.57.

III.

Said shipments so made by defendant consisted of numerous cases or packages of bottled beer, each of which bore a permit as required by the laws of the State of Washington, and each of which was marked in such a manner as fully to comply with the laws of the State of Washington and also the laws of the United States relating to the interstate transportation of intoxicating liquor. Each package in said shipment contained no more than the amount of beer authorized under the laws of the State of Washington to be transported under such a permit. The American Transfer Company, consignee of said shipments, was a corporation operating vehicles for the drayage and transportation of goods in and about the City of Seattle, and the shipments were consigned to it for the purpose of enabling it to distribute the different packages making up said shipments to the individuals whose names appeared on the permits.

IV.

Plaintiff Steamship Company transported the two shipments of beer on one of its steamers to Flavel, at which place they were transferred to freight cars for transportation over the Spokane, Portland and Seattle Railway to Portland, Oregon, where the shipments were to be delivered to the Northern Pacific Railway Company for transportation to Seattle. At and prior to the time of the shipment Spokane, Portland and Seattle Railway Company was operating a special freight service in connection with the steamship line of the plaintiff Steamship

Company, and less than carload shipments were commonly loaded into merchandise cars at Flavel and handled in bulk until arrival at Portland or at some other point at which distribution could be begun. Defendant's two shipments were placed in merchandise cars of this kind for transportation to Portland, at which place they were to be delivered to the Northern Pacific Company for transportation to destination. Thereafter and prior to the delivery of said shipments to the Northern Pacific Railway Company at Portland, the latter company refused to accept said shipments as carload shipments, being of the opinion that under the laws of the State of Washington, the beer could not be transported into Washington in carload lots, and said Spokane, Portland and Seattle Company being also of the opinion that the shipments could not be so transported into Washington as carload shipments, rebilled the two carload shipments at Portland and segregated them into individual less than carload shipments, each package constituting one shipment, and delivered the shipments in that manner to the Northern Pacific Railway Company, which company transported the same under said rebilling to Seattle where delivery of the individual packages was made to the persons whose names appeared on the permits attached thereto, or upon their order. No claims for any additional charges were made upon the different individuals when the packages were delivered.

V.

One of the cars contained 1,109 packages, weighing 60,891 pounds, and the other 1,456 packages,

weighing 79,798 pounds, the weight of each car exceeding the carload minimum named in the tariff. The rates application to the shipments were on file with the Interstate Commerce Commission and were combination rates based upon Portland. The through carload rate from San Francisco to Portland was 15c per 100 lbs., and from Portland to Seattle 15c, making the combination carload rate 30c per 100 lbs., which is the rate paid on said shipments.

The through less-than-carload rate from San Francisco to Portland was 25c per 100 lbs., with a minimum of 50c on a single shipment, and from Portland to Seattle 23c with a minimum of 25c for a single shipment. If the said shipments could not lawfully have been transported into the State of Washington as carload shipments and delivery made to the Transfer Company and plaintiff is entitled to charge the less-than-carload rates for the entire transportation of said shipments, the total charges due plaintiff and its connecting carriers are $1,927.27 and plaintiff is entitled to recover the difference between that sum and the charges based on the carload rates of $425.57 paid at the time of delivery to plaintiff, or the sum of $1,501.70.

VI.

Prior to the making of said shipments plaintiff had entered into an agreement with its connecting carriers by rail hereinabove named, by which it agreed to advance and pursuant to which it did advance to said connecting carriers by rail their respective charges for the portion of the transpor-

tation furnished by each of them respectively, and by which each of said companies authorized plaintiff to collect from defendant the regular tariff charge for the entire transportation from San Francisco, California, to Seattle, Washington.

The Steamship Company's claim for judgment upon this statement of facts is based upon the contention that under the laws of the State of Washington the shipments in question, which were received and billed as carload shipments and the carload rates prepaid, could not lawfully have been transported into that State in carload lots and delivered to the American Transfer Company; that the carriers therefore had to treat each package as a separate shipment; and that they are therefore entitled to charge less-than-carload rates.

The court below, basing its decision upon the decision of this Court on the former review, sustained this contention and granted judgment to the Steamship Company for the difference between the charges prepaid upon the basis of the carload rates and the charges based upon the less-than-carload rates, amounting to $1501.70.

ASSIGNMENT OF ERROR.

The Brewing Company assigns that the Court erred in holding that upon the foregoing facts the Steamship Company is entitled to judgment and in failing to enter judgment of dismissal of this action.

ARGUMENT.

In view of the complete statement of facts which is now in the record, we respectfully invite the attention of the Court to the applicable provisions of the Washington prohibition law found in Remington's 1915 Codes and Statutes.

Section 6262-15, after providing for the issuance of permits for shipments of liquor by County Auditors and the form of such permits, continues as follows (italics ours):

> "*This permit* shall be attached to and plainly affixed in a conspicuous place to any package or parcel containing intoxicating liquor, transported or shipped within the state of Washington, and when so affixed, *shall authorize* any railroad company, express company, transportation company, common carrier, or *any person, firm or corporation operating any* boat, launch or *vehicle for the transportation of goods,* wares and merchandise within the state of Washington, to transport, ship or carry not to exceed one-half gallon of intoxicating liquor other than beer, or twelve quarts or twenty-four pints of beer. Any person so transporting such intoxicating liquor shall, before the delivery of such package or parcel of intoxicating liquor, cancel said permit and so deface the same that it cannot be used again. It shall be unlawful for any person to ship, carry or transport any intoxicating liquor within the state

without having attached thereto or to the package or parcel containing the same, such permit, or to transport or ship under said permit an amount in excess of the amount or quantity hereinbefore limited."

Section 6262-18 reads as follows:

"It shall be unlawful for any express company, railroad company or transportation company, or any person, engaged in the business of transporting goods, wares and merchandise, to knowingly transport or convey any intoxicating liquor within this state, without having a permit issued by the county auditor for the transportation of such intoxicating liquor affixed in a conspicuous place to the parcel or package containing the liquor, or to deliver such liquor without defacing or canceling such permit so that the same cannot be used again. It shall be unlawful for any person to knowingly receive from any railroad company, express company, transportation company or any person engaged in the business of transporting goods, wares and merchandise any intoxicating liquor without said intoxicating liquor having a permit issued by the county auditor for such shipment attached thereto and properly canceled."

It is expressly admitted by the stipulation that each one of the packages which made up the shipments in question was marked in such a manner as fully to comply with the laws of the State of Washington and of the United States relating to the interstate transportation of intoxicating liquor. It

will therefore not be necessary to quote the provisions of the statute upon this point.

What, then, is there in the provisions of the statutes above set forth which made it unlawful to deliver the carload shipments of beer to the American Transfer Company?

The opinion of this Court upon the facts admitted by the pleadings on the former review does not indicate what considerations led it to the conclusion that the shipments could not lawfully be delivered to the American Transfer Company. The Court simply held that it would be unlawful by reason of the prohibitive provisions of the statutes of the State of Washington without stating which particular provisions of the law prohibit such delivery and why.

We can see nothing in the statutes which prohibits such delivery and we can think of no reason for the conclusion which the Court reached unless it be that it did not clearly appear that the individual packages were marked as required by law and that the American Transfer Company is a corporation operating vehicles for the transportation of goods. In the present record it is expressly stipulated that these were the facts.

The statute expressly includes among those authorized to transport intoxicating liquor, a person, firm or corporation operating a vehicle for the transportation of goods. The American Transfer

Company, therefore, had as much right and authority to transport the shipments in question as the other carriers. The shipments were consigned to it for the purpose of distributing the different packages to the individuals whose names appeared on the permits. It constituted a link in the transportation from San Francisco to the purchasers' residence. There would be just as much reason for holding that the Steamship Company could not deliver the carload lots to the railroads as there is for holding that the railroads could not make such delivery to the Transfer Company.

The statute does not confine the right of transportation to railroads and steamships and it makes no distinction between those expressly authorized by the law to transport such packages. All that the rail carriers were required to do in this instance was to deliver the carloads to the American Transfer Company, whereupon their liability would have ceased and it would have been the duty of the latter to deface the permits before delivering the packages to the permitees or purchasers. The law specifically says that any person transporting such intoxicating liquor (which includes a person operating a vehicle for hire), shall, before the delivery of the packages, cancel the permits and deface the same so that they cannot be used again. This means before the delivery to the purchaser or permitee and it is therefore the duty of the last agency authorized by

law to transport such shipments to perform these acts. Since the law expressly recognized the American Transfer Company as an authorized transportation agency there was no more reason why the rail carrier should have defaced the permits upon delivery to the Transfer Company than there would have been for the Steamship Company to insist that it had to deface them before delivering to the railroad company.

Some contention is made that Section 240 of the Federal Code has a bearing upon this case. It provides a penalty for a person to ship packages containing intoxicating liquor in interstate commerce without labeling them so as to show the name of the consignee. It is now stipulated that the packages were marked so as to conform with this section. But aside from this, it has absolutely no bearing upon the question of transportation of packages, whether singly or in the aggregate, much less upon the question whether carload or less-than-carload rates shall be charged. It is a criminal statute and a prohibition upon acts of the shipper and not of the carrier. In case of a violation, the shipper is fined, not by being required to pay higher freight rates, but by the imposition of the penalty provided. To violate this section is an offense against the Government, and the mistake of regarding it as having any bearing upon the question here involved is manifest when it is pointed out that if it would have

been violated by delivering the carloads in question to the consignee named in the bill of lading, it was equally violated by making delivery in any other manner whatsoever. What, then, has this to do with the question of whether or not carload or less-than-carload rates shall be paid?

Notwithstanding these considerations, the Court in its decision on the former review quotes this section and refers to a case in which the same was construed as supporting its conclusion.

U. S. vs. 87 Barrels, etc., of wine, 180 Fed. 215.

In that case, as in the present case, numerous barrels and kegs were shipped in several carloads from San Francisco to Vermont in order to take advantage of carload rates. The individual packages were intended for numerous persons at the point of destination, but each car was consigned to one person or company as consignee. The question was whether under Section 240, which requires that the package be so labeled on the outside cover as to plainly show the name of the consignee, the person or company to whom they were consigned was the consignee within the meaning of the statute, or the purchasers for whom they were ultimately intended and to whom they were to be delivered at destination. The Court held that "consignee" as used in the statute means the person or corporation "to whom the carrier may lawfully make delivery

of the consigned goods *in accordance with its contract of carriage,*" and that delivery of the shipments in bulk to the person named in the bill of lading was therefore legal.

In its opinion on the former review this Court applied the foregoing quotation as if the word "lawfully" had reference to the statute laws instead of the laws governing the rights and duties of carriers under the contract of carriage. This is clearly wrong, as is indicated by the words in italics above and by reference to the opinion of the Court and to the syllabus which reads in part as follows:

> "Held that the term 'consignee' was so used in its primary legal sense to describe the person to whom the liquor was to be delivered at destination in accordance with the contract of carriage."

In discussing the question as to whether under these sections the carrier could deliver the bulk shipments to the consignees named instead of to the persons to whom the packages were ultimately to be delivered, the Court uses this language:

> "There being nothing in the act prohibiting bulk shipments, and nothing requiring liquors to be always delivered to the owner or purchaser or consumer (as such), it seems to me that this record was perfect and that not only was the letter but the spirit of the legislation lived up to. * * *."

It will therefore be seen that this case, instead of sustaining the contention of the steamship Company, when rightly understood sustains the position of the Brewing Company. It clearly holds that under laws such as we are considering, the only duty resting upon a carrier is to deliver the shipments in carload lots to the consignee *in accordance with its contract of carriage,* and not to the individual owners or purchasers.

In conclusion we wish to say that the purpose of all provisions as to the manner in which shipments of intoxicating liquor may be made are to enable the authorities to properly trace and police them for the enforcement of the prohibition laws. Each one of the packages in question complied with all the requirements of the law and had on it the name of the Transfer Company and a permit bearing the name of the person for whom it was ultimately intended, so that delivery thereof to the Transfer Company would not in any way have affected or nullified the law in providing a way for tracing the shipments. Furthermore, the law expressly recognizes a Transfer Company as a transportation company of equal standing under the law with the railroad companies and delivery of these shipments to the Transfer Company was therefore expressly authorized by law. Delivery could have been made by the Transfer Company of the packages to the persons for whom they were intended, as well as

by the railroad company, and with the same effect to all intents and purposes so far as the public authorities and their ability to police and trace these shipments were concerned.

Why, therefore, should the steamship and rail carriers now be permitted to recover the exorbitant charges based upon a high minimum per package simply because they refused to recognize that the Transfer Company is entitled to receive the same consideration under the law as they do?

We submit that this case should be reversed and the action dismissed, as it was by the lower court in the first instance.

Respectfully submitted,

S. J. WETTRICK,
Attorney for Plaintiff in Error.

Seattle, Washington,
August 25, 1920.

No. 3520

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RAINIER BREWING COMPANY, a Corporation
Plaintiff in Error

vs.

GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation
Defendant in Error

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division

Brief for Defendant in Error

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Brief for Defendant in Error

The present appeal we assume is chiefly for the purpose of obtaining a final judgment upon which a review by the Supreme Court of the United States may be predicated; a previous writ of error having failed because the judgment of this court to which the writ was directed was not a final judgment: *Rainier Brewing Company v. Great Northern Pacific Steamship Company*, 40 S. C. R. 54. The brief now submitted for the Brewing Com-

pany presents no question not already considered and decided upon the Steamship Company's writ of error to the trial court's judgment of dismissal upon the pleadings: *Great Northern Pacific Steamship Company v. Rainier Brewing Company*, 255 Fed. 762.

In this situation we see no occasion for restating the argument previously made to this court. If the court's decision is unsatisfactory to the Brewing Company in that it does not give an explanation of its conclusions, at least it is certain that the contentions of the Brewing Company were fully presented to the court upon the former appeal, and the court was fully aware of the theory of the Brewing Company when a conclusion was reached. On the general aspects of the question involved, we desire, therefore, merely to append an excerpt from our brief filed in support of the former writ of error, stating the argument made at that time for the Steamship Company.

The suggestion made in the brief now filed by the Brewing Company that the American Transfer Company, the named consignee of the two shipments of beer involved, was a transportation facility and therefore permitted to take delivery from the rail carriers does not require an extended answer. If the Transfer Company could qualify as a carrier under the prohibition statutes of Washington, certainly it did not assume that character

as to the shipments of beer in question. It was the named consignee and the effort was to have the rail carriers who were charged with the responsibility of transporting *and delivering* the property, deliver these shipments in bulk to the Transfer Company, passing to it the obligations as to delivery to the permittees which were imposed by the Washington statute.

The Great Northern Pacific Steamship Company and its connections, including the Northern Pacific Railway Company as delivering carrier, were the transportation companies which undertook the responsibility of bringing into the State of Washington certain individual shipments of beer. The Transfer Company in Seattle was not one of the transportation agencies employed to handle these shipments, but its professed relation to the shipments was that of consignee. The carriers, therefore, were faced with the question of whether they could make delivery and end their responsibility by turning over the shipments to the named consignee, or whether the statutory provisions imposed upon the carriers the duty of delivering only to the persons in whose names permits had been issued. Under the statute the Transfer Company could not secure a permit, nor could it take delivery for the permittees; hence the carriers could not do otherwise than handle each shipment separately and make delivery of each to its owner.

The Washington prohibition statute contemplated the use of only one agency as between the seller of liquor outside of the state and the purchaser within the state. The word "deliver" in the statute could mean only delivery by the transportation agency to the person in whose name the permit had been issued. There was no statutory provision for an intermediary such as a transfer or drayage company, acting either for the Brewing Company or the permittees. Transportation companies were permitted to bring in properly labeled shipments and to deliver them upon canceling the permit. The Transfer Company in this case did not sustain to the shipment the relation of a transportation agent. On the contrary, it was the attempted consignee, and obviously the transportation companies could not escape their obligations as to delivery by turning the shipments over to the Transfer Company for further handling.

CAREY AND KERR, and
CHARLES A. HART,
Attorneys for Defendant in Error.

ADDENDUM.

ARGUMENT.

The single question in this case is whether or not the Brewing Company's shipments of beer could lawfully have been transported into Washington as carload shipments and delivered by the carriers to a transfer company. If notwithstanding the requirements of the state and federal statutes then effective the beer could have been handled to destination and delivered as planned at the time of shipment, obviously the carriers may not now recover additional charges even though they have performed the additional services consequent upon the handling of the packages in less than carload lots. If, on the contrary, the carriers could lawfully handle the shipments only by assuming responsibility for the transportation and delivery to the individual permittees (the ultimate consignees under the Washington statute) of their respective packages, then there was collectible from these consignees or from the shipper (defendant in error) the tariff charges applicable to the character of transportation furnished.

We may dismiss from consideration at once any suggestion that the carriers by accepting the beer billed as two carload shipments, obligated themselves to carry it in that manner and precluded the assessment of transportation charges on any other basis. *Texas & Pacific Co. v. Mugg*, 202 U. S. 242

(cited and approved in many later cases) settled that an interstate carrier must collect its tariff rates applicable to the transportation furnished, no matter what may have been its expressed undertaking with the shipper. When after the acceptance of the shipments and after their transportation had commenced, it became apparent that the transportation service could be lawfully performed only by assuming responsibility for the individual packages, the obligation to so transport and deliver the beer and to collect the tariff charges for that kind of transportation became impliedly a part of the contract of the parties.

When the rail carriers took the shipments from the Steamship Company and the question of carload or less than carload handling became of importance, the rail carriers were forced to determine in what manner the shipping contract could be performed without violation of law; how the beer could be transported to its destination at Seattle and delivered in conformity with the restrictions imposed upon the carriers by state and federal law. Their conclusion was that the Washington prohibition law and the federal criminal code (Sec. 238, Criminal Code, Section 10408, Compiled Statutes 1916) forbade the transportation in bulk and required them to undertake the duty of transporting and delivering the individual packages making up the two shipments to the persons who under the permits affixed to the packages had been authorized by law

to receive them. If this conclusion is correct, it follows that the charges for the handling of the individual shipments are collectible.

It is clear, too, that notwithstanding the interstate character of the shipments, compliance with the requirements of the state statutes was necessary. Under the Webb-Kenyon law (37 Stats. 699, Sec. 8739, U. S. Comp. Stats. 1916) the carriers could bring this beer into Washington and deliver it only when the requirements of the Washington law had been observed: *State v. Great Northern Railway Co.*, 165 Pac. 1073; *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311.

The applicable provisions of the Washington prohibition law are found in Sections 6262-15 to 6262-20, inclusive, Remington's 1915 Codes and Statutes. They provide a plan for the shipment into the state by individuals of a limited quantity of liquor every twenty days. Section 6262-15 provides that "any person" desiring to ship or transport any intoxicating liquor shall personally appear before the county auditor and make a sworn statement showing, among other things, his name, that he is over 21 years of age, and the name and address of the person, firm or corporation from whom the shipment is to be made. Upon this statement the county auditor is authorized to issue a permit to the individual to "ship or transport" the limited quantity of liquor, and the permit so

issued authorizes the permittee to transport the liquor, or if he desires to ship it, authorizes the carrier with which he may make shipping arrangements to handle it for him. The authority given the carrier by this action and by Section 6262-18 is specific. When the applicant gets his permit and affixes it to the package, the carrier may transport it, *providing* it contains not more than one-half gallon of liquor other than beer, or twelve quarts or twenty-four pints of beer. Before completing the transportation and delivering the package of liquor the carrier must cancel the permit and deface it so that it cannot be used again; and it is made unlawful for the carrier to transport or carry any intoxicating liquor except as authorized by the permit, or to carry for any one under the authority of a permit more liquor than the limit provided by statute.

Section 6262-18 prohibits carriers from bringing liquor into the state except in packages having affixed and prominently displayed the permits issued by the county auditor; and forbids the carrier to deliver or the consignee to receive the package unless it has the requisite permit properly attached and cancelled. Section 6262-20 contains the added requirement that the carrier must not transport the liquor within the state unless the package is clearly and plainly marked with the words "This Package Contains Intoxicating Liquor."

Statutes imposing restrictions on carriers in the handling of intoxicating liquors almost universally require more than that they shall knowingly refrain from aiding in law violations. The manifest difficulty of enforcing prohibition laws without active co-operation by the carriers is held to justfy regulations which amount practically to a policing of shipments by the transportation companies: *Commonwealth v. Mixer*, 207 Mass. 141, 93 N. E. 249.

This clearly is the intent of the Washington prohibition statute. In the same section of the law (6262-15) granting to the individual a limited right to bring in intoxicating liquor is found the authority given the carrier to transport the liquor; and under that authority the carrier may transport the liquor covered by the permit and no more. Before completing the transportation and making delivery of the package to the individual entitled to it, the carrier is charged with the duty of cancelling and defacing the permit affixed to the package. The carriers are expressly forbidden (Section 6262-18) to bring any liquor into the state except that permitted by the policing regulations referred to; and it is a violation of the law for a carrier to turn over any of these package shipments to the persons entitled without the cancellation and defacement of the permit.

The effect of these regulations is to require of the carrier active aid not only in keeping out unau-

thorized shipments of liquor, but in preventing the individual from securing more than the amount allowed or from importing it more frequently than is permitted by the statute. The carrier must assume responsibility for the transportation *and delivery* of each and every package of liquor shipped; when the individual exercises the statutory permission to bring in liquor, the carrier who is authorized to transport it for him first must make certain that the permittee has secured the right to ship, and second, must see to the cancellation of his permit before he is allowed to receive his shipment.

The duty thus imposed upon the carriers of policing individual shipments is wholly inconsistent with the right to transport in bulk or carload shipments contended for by the Brewing Company in this case. It asked of the carriers that they take into Washington two carloads of beer (made up, it is true, of individual packages, each with its permit affixed), and to make delivery not of the packages to the individual permittees whose authority to ship contained the carrier's only authority to transport, but of the carloads of beer to a transfer company.

The purpose of the statute was to prevent all importation of liquor except by individuals under special license issued by county auditors, and to forbid all transportation of liquor except that carried for these individuals under the permits secured by them; and the carriers were called on to see that

these individuals did not take delivery of their shipments until certain prerequisites had been complied with. The Transfer Company — the named consignee of the Brewing Company's carload shipments — could not import any liquor. It could not qualify as the permittee to whom, after cancellation of the permit affixed to the package, the carrier was authorized to make delivery. Clearly the framers of the statute intended that the carriers whose right to transport liquor was so carefully limited should be responsible for the packages from the time they entered the state until they were delivered; that is, until they were placed in the possession of the persons entitled by law to receive them and for whom the carrier was allowed to handle them.

The Brewing Company's argument apparently is that the carriers are given blanket authority to bring into Washington for brewing companies' distributing agents, transfer companies and others, bulk shipments of liquor, providing only that the shipments include only packages containing not more than the statutory limit and each bearing a permit cancelled and defaced at some time during transportation; and that the matter of delivery to the permittee may be left to the distributing agent, transfer company or other person or corporation receiving the carload shipments from the carrier.

No such general license to transport liquor is

given the carriers by the Washington prohibition law. The argument of the Brewing Company fails to notice that the only authority given the carriers is in respect of the transportation for the individual of the liquor covered by his permit. The statute (Section 6262-15) in effect says to the individual "you may bring in or have brought in by a carrier a limited quantity of liquor every twenty days," and to the carrier, "you may bring in the liquor and deliver it, after cancelling and defacing the permit to the person so authorized to receive it."

It will be urged that there is nothing in the statute expressly forbidding bulk shipments to a distributing agent— that the prohibition (Section 6262-18) is merely against the transportation of any liquor except that covered by permits, and that the way in which these "permit" shipments are brought in is immaterial. This overlooks the fact that the statute forbids all traffic in and transportation of intoxicating liquor, *except* as authorized by the statute. Section 6262-18 must be read in conjunction with Section 6262-15, which grants the only right given by the law to bring or have transported into the State of Washington any intoxicating liquor. This latter section allows an individual at stated intervals and under carefully stated restrictions either to bring in or arrange with a carrier to ship in a limited quantity; and the transportation thus sanctioned is all that the carrier may undertake.

These "limited quantity" shipments the law says the carrier must not deliver until it has cancelled and defaced the permits; and when the purpose of the statute is kept in mind, it is apparent that the delivery contemplated to be made by the carrier is to the individual who has secured the statutory permission to bring in the liquor. The sections of the statute referred to deal with the right of individuals to import liquor and the right to transport and deliver granted to the carriers pertains to these same individual shipments. The carrier's responsibility is to see that certain regulations are obeyed before it may turn over to the individual his shipment of liquor; and the purpose of the act in placing this obligation upon the carrier makes it certain that its deliveries of liquor can be to no other persons than the individuals upon the strength of whose permits the transportation is undertaken.

While the language of the statute is not specific, its provisions taken as a whole indicate beyond question that carriers were to assume responsibility for the transportation *and delivery* of the shipments in accordance with the restrictions imposed; and the "delivery" referred to must be interpreted as meaning the taking of possession by the individual permittee.

Any other construction of the statute would render it, so far as the transportation restrictions are concerned, wholly ineffective. Transfer companies,

distributing agents and the like are not named in the statute as authorized to handle liquor shipments, nor are any limitations with respect to delivery imposed upon them. If the carrier has no responsibility other than to see to the cancellation of the permit after the transportation has been begun, and if a delivery to the Transfer Company or distributing agent—after the cancellation of the permit—is a full compliance with its duty, supervision of the shipments would end with that delivery and the Transfer Company or distributing agent would be free to dispose of the shipments to the permittees, their assignees, or to any one else claiming to be entitled to possession.

Under this interpretation of the law a liquor dealer outside the state could readily establish within the state a distributing depot or agency in charge of an agent whose activities would only be limited by the number of permits he might be able to secure; and the state would be powerless to check the traffic or take any steps to see that the package shipments reached only the individuals to whom the permits had been issued.

No specific provision of the statute is directed toward such a practice, *because* the only transportation which the carriers are allowed to undertake is of the shipment of the individual securing the permit; and before the carrier can deliver it over and before he can take it, the carrier must cancel

the permit. This limitation upon the right to transport and the requirement with respect to delivery, make it clear that the carrier must handle each package shipment separately as the shipment of the permittee and must assume responsibility for its delivery, with the permit cancelled and defaced, to the permittee.

The policing regulations of the statute, apart from the question of delivery, are inconsistent with the idea of carload or bulk transportation. Carload shipments ordinarily move under seal from the warehouse of the shipper to the industry track of the consignee. The carrier is not concerned with the contents of the cars except in so far as inspection for rate classification may be necessary; and the great disparity between the carload and less than carload transportation charge presupposes no other service in respect of carload shipments than the hauling of a car loaded by the shipper from his industry to the plant of the consignee at destination where the car is unloaded by the consignee.

This limited transportation service is, of course, inapplicable to Washington liquor shipments. Each package of liquor handled is subject to examination by the carrier, since the right of the carrier to transport it is conditioned upon its containing not more than the quantity allowed by law. Each package must be scrutinized by the carrier to make certain that it is conspicuously labeled, and that it has

the statutory permit affixed; and finally the carrier before delivery must cancel and deface the permit on each package.

These requirements argue conclusively that it was intended to place upon the carriers responsibility for the transportation as separate shipments of the individual packages of liquor allowed to be brought in; and to compel retention of that responsibility until the liquor was turned over to the person allowed by law to receive it. Transportation service of that kind could be performed only by handling these shipments of beer as less than carload shipments. Transportation in bulk or carload shipments and delivery to a transfer company or distributing agent was not authorized by anything in the Washington statute, and the practice would be violative of the purposes of the prohibition law.

Section 238 of the Criminal Code of the United States (35 Stats. 1136, Sec. 10408 Comp. Stats. 1916) is as follows:

> "Any officer, agent, or employe of any railroad company, express company, or other common carrier, who shall knowingly deliver or cause to be delivered to any person other than the person to whom it has been consigned, unless upon the written order in each instance of the bona fide consignee, or to any fictitious person, or to any person under a fictitious name, any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind which has been shipped from one state, territory, or district of the United States, or place noncon-

> tiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both."

Under this statute liquor shipments may not be delivered to any one but the consignees, or to persons presenting written orders from the consignees; and the "consignees" have been defined (*U. S. v. Eighty-seven Barrels, etc., of Wine*, 189 Fed. 215) as meaning those persons or corporations to whom the carrier may lawfully make delivery of the consigned goods.

Applying this statute in conjunction with the Washington statute, there results a positive inhibition against the delivery by the carrier of the individual liquor shipment to any one else than the person named in the permit. Notwithstanding the naming of a transfer company as consignee, the individual permittee was the only one authorized by the Washington law to ship the liquor and to take delivery after the cancellation of the permit. In the language of the decision last cited, he was the one "to whom the carrier might lawfully make delivery of the consigned goods"; and the provision of the Criminal Code referred to made it a federal offense to deliver the liquor to any one else.

When the carriers undertook the transportation of these consignments of beer to Seattle they were apprised by the permits that the individuals there named were the ultimate consignees of the packages included in the shipments. Delivery to the named consignee (the Transfer Company) or to any one else than the permittees individually would have been a violation of state and federal law; and the assumption of responsibility for the individual packages and for their delivery to the different permittees meant the handling of the packages as less than carload shipments.

We submit that the trial court was wrong in disallowing the claim for the less than carload freight charges.

CAREY & KERR,
CHARLES A. HART,
Attorneys for Plaintiff in Error.

No. 3521

United States
Circuit Court of Appeals
For the Ninth Circuit.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Plaintiff in Error,

vs.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3521

United States

Circuit Court of Appeals

For the Ninth Circuit.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Plaintiff in Error,

vs.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Names and Addresses of Counsel.

Messrs. TUCKER & HYLAND, Attorneys for Plaintiffs in Error,

307 Lowman Building, Seattle, Washington.

Messrs. RIGG & VENABLES, Attorneys for Plaintiff in Error,

Yakima, Washington.

Messrs. PRESTON, THORGRIMSON & TURNER, Attorneys for Defendants in Error,

911 Lowman Building, Seattle, Washington.

CHARLES H. HARTGE, Esq., Attorney for Defendants in Error,

521 Central Building, Seattle, Washington.

[1*]

In the Superior Court of the State of Washington, in and for King County,

No. 136,226.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Complaint.

CHARLES H. HARTGE, 521 Central Building, Seattle, Washington, Attorney for Plaintiffs.

Come now Etta Eichelbarger and Stanley Eichel-

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*Page-number appearing at foot of page of original certified Transcript of Record.

barger, her husband, by their attorney, Charles H. Hartge, and for cause of action against defendants, Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, allege:

I.

That said defendant Al. G. Barnes Show Company is a foreign corporation.

II.

That plaintiffs are now and have been at all times herein mentioned husband and wife.

III.

That the defendants on the twenty-first day of June, 1917, and for long prior thereto, and at all times subsequent, have been and now are, the owners and operators of a large circus, and on the twenty-first day of June, 1917, the said defendants gave a large show of said circus at the town of Toppenish, in the State of Washington, and for the purpose of inducing the public to attend said show, extensively advertised the same and invited the public to attend upon the said show, and the plaintiff, Etta Eichelbarger, on said day, in the [2] evening, attracted by the said advertisements, went to the said show, and paid admission to the defendants and was admitted into the said show, and was directed by an attendant in the employ of the defendants to take a seat in a certain row of seats temporarily constructed under canvas, one situated above another, and all accessible only by walking from the lower seat up across the said seats to the upper tiers of the said row of seats, and in pursuance of said direction said plaintiff, Etta Eichelbarger, stepped upon the said

seats and went up near the top of the said row or bank of seats for the purpose of choosing a seat, and in so doing said plaintiff, Etta Eichelbarger, stepped upon a seat which was in the said row or bank, which said seat when stepped upon by the said plaintiff, Etta Eichelbarger, broke and precipitated the said plaintiff, Etta Eichelbarger, down through the said row or bank of seats on to the ground beneath, a distance of about ten feet; that the said seat was weak and defective and the said accident was caused solely by the negligence of the defendants in placing in the said row or bank of seats the said defective and weak seat and in directing the said plaintiff, Etta Eichelbarger, as aforesaid, to seek a seat in the said row or bank, and for that purpose to step upon the said seats; that in all respects the said plaintiff, Etta Eichelbarger, used due care and was wholly free from any fault or negligence, and the said accident was caused solely by the said negligence of the defendants aforesaid; that by such injury plaintiff, Etta Eichelbarger, is compelled to use her right foot in an unnatural position, thereby throwing a greater burden on her left foot and ankle, thereby straining the same in use and weakening the same and causing her pain and discomfort, and causing callous places on the inside of said left foot; that during much of the time of each day she suffers pain in said injured right foot and ankle, thereby rendering her nervous and unfit for continuous work of any kind, and causing her to suffer a nervous pain in the back of the neck and head, and in her hip, rendering her, many times at night, unable to sleep well; that said right

foot, by reason of said injury, is always cold; that all of said conditions have existed at all times since said injury, are permanent and will continue for the rest of her life; that for several years prior to said injury, in addition to performing her household duties, plaintiff, Etta Eichelbarger, worked one-half or more of her time at day-work doing housework, and was able, and would at all times since and now be able but for such injury, to earn the going rate of wages for such work, which at the time of said injury was two dollars per day for eight hours, and which at all times since January 1st, 1918, has been at least three dollars per day for eight hours, and at all times since January 1st, 1919, four dollars per day for eight hours; that she is by such injury wholly incapacitated for such work or any other continuous or active work and her earning power thereby reduced to not over one-fourth of her former earning power. [3]

IV.

That by the said fall the plaintiff Etta Eichelbarger's right ankle was dislocated, and her ankle was fractured with a Potts fracture, and the ligaments and muscles of her right leg, ankle and foot torn loose, strained, mangled and injured, and the said plaintiff, Etta Eichelbarger, was caused great pain, suffering and distress, and was confined to her bed and chair [4] for a period of six weeks, and thereafter was compelled to go on crutches until about the first day of November, 1917, and ever since said last-mentioned date has been compelled in walking to use a cane, and said plaintiff's ankle has become greatly enlarged, and the same and her foot

distorted and deformed and her right leg shortened, and the muscles of said leg wasted, and the said plaintiff, Etta Eichelbarger, has been permanently maimed, deformed and injured, and plaintiff, Etta Eichelbarger, will never fully recover from the said injury, but will always be lame and partially disabled from active pursuits.

IV.

That plaintiff, Etta Eichelbarger, at the time of said injury was of the age of thirty-three years and in good bodily health and strength, and would be in the same condition at the present time except for the said injury; that plaintiff, Etta Eichelbarger, is a housewife living in the City of Seattle, said county and state, with her husband, the said plaintiff, Stanley Eichelbarger, and the children of the plaintiffs, now of the age of ten and eleven years, respectively.

V.

That the plaintiffs have been damaged by reason of the premises in the sum of TEN THOUSAND DOLLARS ($10,000.00).

WHEREFORE, plaintiffs pray for judgment against the said defendants and each of them in the sum of Ten Thousand Dollars ($10,000.00), and for their costs and disbursements herein.

CHARLES H. HARTGE,
Attorney for Plaintiffs. [5]

State of Washington,
County of King,—ss.

Etta Eichelbarger, being first duly sworn, on oath says: That she is one of the plaintiffs above named; that she has read the foregoing complaint, knows

the contents thereof, and believes the same to be true.

ETTA EICHELBARGER.

Subscribed and sworn to before me this 29th day of May, 1919.

CHARLES H. HARTGE,

Notary Public in and for the State of Washington, residing at Seattle, in said State.

Filed in Clerk's Office June 18, 1919. Percy F. Thomas, Clerk. By A. N. Olson, Deputy.

[Endorsed]: Complaint. Filed in the United States District Court, Western District of Washington, Northern Division. June 26, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

In the Superior Court of the State of Washington, in and for King County,

No.——

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Summons.

The State of Washington, To the said AL. G. Barnes Show Company, a Corporation, and Al. G. Barnes, Defendants:

You and each of you are hereby summoned and re-

quired to appear within twenty (20) days after the service of this summons, exclusive of the day of service, answer the complaint and serve a copy of your answer upon the undersigned attorney for plaintiffs at his office below stated, and defend the above-entitled action in the Superior Court of the State of Washington in and for King County, in which said court this action is brought, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which will be filed in the above-entitled court, and copy of which is herewith served upon you.

Plaintiffs hereby designate said King County as the place of trial.

CHARLES H. HARTGE,
Attorney for Plaintiffs.

Office and Postoffice Address:
521 Central Building,
Seattle, King County,
Washington.

Received May 31, 1919.

JOHN STRINGER,
Sheriff, King County, Wash.

[Indorsed]: Summons. Filed in the United States District Court, Western District of Washington, Northern Division. June 26, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [7]

In the Superior Court of the State of Washington for King County.

No. 136,226.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Petition for Removal to the United States District Court for the Western District of Washington, Northern Division.

To the Honorable BOYD J. TALLMAN, Presiding Judge, and Associate Judges of the Superior Court of the State of Washington for King County:

Comes now the defendants and respectfully petition this Honorable Court for the removal of this cause to the United States District Court for the Western District of Washington, Northern Division, and, for cause of removal, state:

I.

That this action was commenced by the service of summons upon defendants on the 29th day of May, 1919.

II.

That plaintiffs herein are now and have been at all times herein mentioned, husband and wife; that

said plaintiffs are both citizens and residents of the State of Washington, residing at Seattle, King County, and were such citizens and residents and so resided at the date of the commencement of this action, and ever since have been such citizens and residents and so resided.

III.

That at the time of the commencement of this action, and ever since and now the defendant Al. G. Barnes Show Company, was, has been and still is a corporation organized and existing under and by virtue of the laws of the State of Colorado and duly [8] authorized to transact business in the State of Washington. That at all times since the commencement of this action, it was and still is a resident and citizen of the State of Colorado, having its principal place of business at Denver, in said state. That the defendant herein, Al. G. Barnes, is a citizen and resident of the State of California, residing in Venice, Los Angeles County, in said state, and was such citizen and resident and so resided at the date of the commencement of this action, and ever since has been such citizen and resident and so resided.

IV.

That this is a controversy between citizens and residents of different states, to wit, in that plaintiffs are both of them citizens and residents of the State of Washington, and the defendants, Al. G. Barnes Show Company and Al. G. Barnes are citizens and residents of the State of Colorado, and California respectively, and that the controversy between plaintiffs and the defendants involves an amount in favor

of plaintiffs and against the defendants of more than $3,000.00; and the matter in controversy between the plaintiffs and each of them on the one hand and the defendant on the other hand exceeds, exclusive of interest and costs, the sum of $3,000.00, to wit, that said plaintiffs pray for a judgment for $10,000.00.

V.

That the time has not elapsed when defendant, under the laws of the State of Washington and the rules of the Superior Court of the State of Washington for King County, is required to answer or plead to the complaint of the plaintiffs.

VI.

That the defendants, Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, herewith present their bond for the approval of this Honorable Court with D. H. Moss & Co. and C. A. Philbrick as sureties in the sum of $500.00, duly conditioned as required by law that defendants will enter in the United States [9] District Court for the Western District of Washington, Northern Division, within thirty days from the date of this petition, a certified copy of the record in this suit, and conditioned to pay all costs that may be awarded by said United States District Court for the Western District of Washington, Northern Division, in said District Court should hold that this suit is wrongfully or improperly removed thereto.

WHEREFORE, your petitioners humbly pray that an order may be entered transferring and removing this cause from the Superior Court of the State of Washington for the County of King to the United

States District Court for the Western District of Washington, Northern Division, that being the District where such suit is pending.

TUCKER & HYLAND,
Attorneys for the Defendants-Petitioners.

State of Washington,
County of King,—ss.

Wilmon Tucker, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendants, the petitioners herein, making the foregoing petition and asking for the removal of this cause to the United States District Court for the Western District of Washington, Northern Division; that he has read the said petition, knows the contents thereof, and believes the same to be true; that he is duly authorized and qualified as attorney for said defendants to sign this petition for the removal of this said cause; that he makes this affidavit for and on behalf of said defendants, for the reason that said defendants are not citizens of this state and are not present here.

WILMON TUCKER.

Subscribed and sworn to before me this 17th day of June, 1919.

ANNE C. MARTIN, [10]
Notary Public in and for the State of Wash., Residing at Seattle.

Service of within petition this 17th day of June, 1919, and receipt of a copy thereof admitted.

CHARLES H. HARTGE,
Attorney for Pltf.

Filed in Clerk's Office June 17, 1919. Percy F. Thomas, Clerk. By W. T. Hatt, Deputy.

[Indorsed]: Petition for Removal to the United State District Court for the Western District of Washington, Northern Division. Filed in the United States District Court, Western District of Washington, Northern Division. June 26, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

In the Superior Court of the State of Washington, for King County.

No. 136,226.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS: That the Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, as principals, and D. H. Moss and C. A. Philbrick, as sureties, are held and firmly bound unto the plaintiffs, Etta Eichelbarger and Stanley Eichelbarger, her husband, in the full and penal sum of Five Hundred ($500.00) Dollars, to the payment of which well and truly to be made, they and each of them, bind themselves, their successors, heirs, executors and administrators jointly, severally and

firmly by these presents.

Signed and sealed this 17th day of June, 1919.

THE CONDITION of the foregoing obligation is such that WHEREAS, the Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, have petitioned the Honorable Superior Court of the State of Washington for the County of King for the removal of this cause from said Superior Court to the United States District Court for the Western District of Washington, Northern Division;

NOW, THEREFORE, if said Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, shall, within thirty days from the date of filing of said petition for the removal of this cause enter in the said United States District Court for the Western District of Washington, Northern Division, a certified copy of the [12] record of this suit and shall pay all costs that shall be awarded by said United States District Court for said Western District of Washington if said District Court shall hold that this suit was wrongfully and improperly removed thereto, then this obligation to be null and void; otherwise to remain in full force and virtue.

AL. G. BARNES SHOW COMPANY,
By TUCKER & HYLAND,
Its Attorneys,
AL. G. BARNES,
By TUCKER & HYLAND,
His Attorneys,
Principals.
D. H. MOSS,
Surety.
C. A. PHILBRICK,
Surety.

State of Washington,
County of King,—ss.

D. H. Moss and C. A. Philbrick, being each first duly sworn, on their oaths depose and say, each for himself:

That he is a vice-president of the First National Bank of Seattle, Washington; that he is not a sheriff, clerk of court, attorney at law, or any other officer of any court; that he is worth at least the sum of $500.00 in separate, individual property, exclusive of property exempt from execution.

D. H. MOSS.
C. A. PHILBRICK.

Subscribed and sworn to before me this 17th day of June, 1919.

[Seal] W. H. BERRY,
Notary Public in and for the State of Washington,
Residing at Seattle.

The foregoing bond is hereby this day approved in form, penalty and as to the sufficiency of the sureties.

Done in open court this 20th day of June, 1919.

BOYD J. TALLMAN. [13]

Service of within bond this 17th day of June, 1919, and receipt of a copy thereof admitted.

CHARLES H. HARTGE,
Attorneys for Pltf.

Filed in Clerk's Office, June 20, 1919. Percy F. Thomas, Clerk. By A. N. Olson, Deputy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. June 26, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [14]

In the Superior Court of the State of Washington, for King County.

No. 136,226.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Order for Removal.

This cause coming on for hearing upon the application of the defendants, Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, for an order removing this cause from the Superior Court of the State of Washington for King County to the United States District Court for the Western District of Washington, Northern Division; and it appearing to the Court that this is a controversy between citizens and residents of different States, and that the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum of $3,000.00, and the time for the filing of the petition by the defendant for such removal and the time provided by the laws of the State of Washington and the rules of this court, has not expired in which said defendant is required to

answer or plead to the complaint of plaintiffs; and it further appearing to the Court that a bond in due and proper form as required by law, with sufficient penalty and with sufficient sureties, is duly presented with said petition and filed in this cause; and it further appearing that, prior to the filing of said petition and bond, notice was given to plaintiffs in writing of said petition and bond;

It is, therefore, here and now ORDERED, ADJUDGED AND [15] DECREED that this cause be, and it hereby is, removed from this court to the United States District Court for the Western District of Washington, Northern Division, and the clerk of this court is hereby directed to prepare and certify a copy of the record in this suit under his hand and seal upon the payment of the proper fees therefor and deliver the said certified copy of said record to said defendants, or their attorneys.

Done in open court this 20th day of June, 1919.

BOYD J. TALLMAN,
Judge.

Service of within order for removal this 17th day of June, 1919, and receipt of a copy thereof admitted.

CHARLES H. HARTGE,
Attorneys for Pltf.

Filed in Clerk's Office, June 20, 1919. Percy F. Thomas, Clerk. By A. N. Olson, Deputy.

[Indorsed]: Order for Removal. Filed in the United States District Court, Western District of Washington, Northern Division. June 26, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [16]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Stipulation and Order Amending Bill of Complaint.

The Court having heretofore, upon motion of defendants, ordered the words, "and the children of the plaintiffs, now of the age of ten and eleven years respectively," stricken from the fourth (4th) paragraph of the complaint, it is now stipulated and an order may be made accordingly that the plaintiffs shall have leave to make said amendment without rewriting said complaint by drawing a pen through the said words.

CHARLES H. HARTGE, and
PRESTON, THORGRIMSON & TURNER,
Attorneys for Plaintiffs,
TUCKER & HYLAND,
Attorneys for Defendants.

ORDER.

Upon the foregoing stipulation it is ORDERED that plaintiffs have leave to amend the complaint to conform to the order of this Court heretofore made

striking the words mentioned in said stipulation from the fourth (4th) paragraph of the complaint by drawing a pen through the words so to be stricken [17] and without the necessity of filing an amended complaint.

Done in open court this 20th day of October, 1919.

EDWARD F. CUSHMAN,
Judge.

[Indorsed]: Stipulation. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 20, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,
Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,
Defendants.

Answer.

COME NOW the defendants, Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, and for answer to the complaint of the plaintiffs, on file herein, admits, denies and alleges as follows:

I.

Defendants admit the allegations contained in paragraph "I" of said complaint.

II.

Touching the matter of the facts set forth in paragraph "II" thereof, defendants allege that they have no knowledge or information sufficient to form a belief as to the truth thereof, and therefore deny the same.

III.

Touching the matter of the facts set forth in paragraph "III" of said complaint, defendants admit that on June 21st, 1917, for a long time prior thereto, and at all times subsequent, they have been and now are the owners and operators of a large circus, and on the 21st day of June, 1917, said defendants gave a large show of said circus at the town of Toppenish, in the State of Washington. As to whether said Etta Eichelbarger on said day, went to said show, paid admission to said defendants, and was admitted [19] into said show, these defendants have no knowledge or information sufficient to form a belief and therefore deny the same and the whole thereof, and these defendants deny each and every other allegation, matter and fact in said paragraph contained.

IV.

Referring to paragraph "IV" of said complaint, defendants deny each and every allegation contained therein.

V.

Referring to paragraph "V" of said complaint, erroneously numbered "IV," defendants deny each

and every fact alleged and contained therein.

VI.

Referring to paragraph "VI" of said complaint, erroneously numbered "V," defendants deny each and every fact alleged and contained therein.

FOR A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE these defendants allege that if said plaintiff Etta Eichelbarger was injured on June 21st, it was through her own negligence, carelessness and want of care and caution, and not through any want of care or lack of duty or failure in the performance of any obligation or duty on the part of said defendants toward said plaintiff.

WHEREFORE, defendants, having fully answered said complaint, pray that same may be dismissed and that they have and recover their costs and disbursements herein expended.

RIGG & VENABLES.
TUCKER & HYLAND.

State of Washington,
County of King,—ss.

Wilmon Tucker, being first duly sworn, upon [20] his oath deposes and says that he is one of the attorneys for the defendants herein; that he has read the within and foregoing answer, knows the contents thereof and believes the same to be true; that he makes this verification for the reason that the defendant Al G. Barnes Show Company is a corporation organized outside of the State of Washington, and none of its officers or agents are within the State of Washington, and that the defendant Al. G. Barnes is a nonresident of the State of Washington.

WILMON TUCKER.

Subscribed and sworn to before me this 21st day of October, 1919.

FRED. ELVIDGE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of within answer this 22d day of Oct., 1919, and receipt of a copy thereof, admitted.

PRESTON, THORGRIMSON & TURNER
and
CHARLES H. HARTGE,
Attorneys for Pltfs.

[Indorsed]: Answer. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 23, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,
Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,
Defendants.

Reply.

Come now the plaintiffs, by their attorneys, Charles

H. Hartge and Preston, Thorgrimson & Turner, and deny each and every allegation contained in that part of defendants' answer alleged as a further, separate and affirmative defense.

WHEREFORE, plaintiffs pray as in their complaint.

CHARLES H. HARTGE,
PRESTON, THORGRIMSON & TURNER,
Attorneys for Plaintiffs.

State of Washington,
County of King,—ss.

Etta Eichelbarger, being first duly sworn, upon oath deposes and says that she is one of the plaintiffs above named; that she has read the within and foregoing reply, knows [22] the contents thereof and believes the same to be true.

ETTA EICHELBARGER.

Subscribed and sworn to before me this 24th day of October, 1919.

[Notarial Seal] CHARLES H. HARTGE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of the within Reply by delivery of a copy to the undersigned is hereby acknowledged this 25th day of October, 1919.

TUCKER & HYLAND,
Attorneys for Defendants.

[Indorsed]: Reply. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 25, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy, [23]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Motion for New Trial.

Come now the defendants, by their attorney, Tucker & Hyland and Rigg & Venables, and respectfully move the Court for a new trial in the above-entitled cause on the following grounds and reasons:

I.

Irregularity in the proceedings of the court, and jury and plaintiffs and abuse of discretion by which the defendants were prevented from having a fair trial.

II.

Misconduct of the plaintiffs and of the jury.

III.

Accident and surprise by which the defendants with ordinary prudence could not have guarded against.

IV.

Newly discovered evidence, material for the defendants, which they could not with reasonable dili-

gence have discovered and produced at the trial.

V.

Excessive damages appearing to have been given [24] under the influence of passion or prejudice.

VI.

Error in the assessment of the amount of recovery, the same being too large.

VII.

Insufficiency of the evidence to justify the verdict, and that the same is against the law.

VIII.

Error in law occurring at the trial and excepted to at the time by the defendant.

This motion is based upon the files and records herein.

TUCKER & HYLAND and
RIGG & VENABLES,
Attorneys for the Defendants.

Service of within motion this 31st day of Jan., 1920, and receipt of a copy thereof, admitted.

PRESTON, THORGRIMSON & TURNER,
and
CHARLES H. HARTGE,
Attorneys for Pltfs.

[Indorsed]: Motion for New Trial. Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 31, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [25]

In the District Court of the United States for the Western District, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Order Overruling Motion for New Trial.

The above-entitled cause having come on this day on motion of defendants for a new trial and the said motion having been submitted to the Court by stipulation without argument,—

It is now by the Court, being duly advised in the premises, ordered that the said motion for a new trial be and the same is hereby overruled, to which defendants duly excepted in open court and said exception is now noted and allowed.

Done in open court this fifth day of April, 1920.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Order Overruling Motion for a New Trial. Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 5, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [26]

United States District Court, Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Excerpt from Appearance Docket.

May 3, 1920. Lodged Bill of Exceptions. Law Docket—Volume 8, page 62. [27.

In the District Court of the United States for the Western District of Washington.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiffs and assess their damages at the sum of

Five Thousand and 00/100 Dollars ($5,000.00).

JOHN F. ADAMS,
Foreman.

[Indorsed]: Verdict. Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 30, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [28]

In the District Court of the United States for the Western District, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Judgment.

Now, on this 5th day of April, 1920, this cause came on for hearing upon the motion of Charles H. Hartge and Preston, Thorgrimson & Turner, attorneys for plaintiffs, to enter judgment on the verdict heretofore rendered by the jury in this action, and it appearing to the Court that heretofore this cause came on duly to be tried before this Court and a jury having been duly impaneled and sworn and evidence having been introduced on the part of the plaintiffs and the plaintiffs and defendants having rested and

the said cause duly submitted to the jury after argument by counsel for plaintiffs and defendants and the instructions of the Court, the said jury having thereupon retired to consider their verdict and having, on the 30th day of January, 1920, on the same day, returned into court a verdict in favor of the plaintiffs against the defendants in the sum of Five Thousand Dollars ($5,000.00).

Now, therefore, in consideration of the premises it is by the Court ordered and adjudged and these presents do hereby order and adjudge that plaintiffs, Etta Eichelbarger and Stanley Eichelbarger, her husband, do have and recover of [29] and from the defendants Al. G. Barnes Show Company, a corporation, and Al. G. Barnes the sum of Five Thousand Dollars ($5,000.00), with interest thereon at the rate of six per cent (6%) per annum from the 30th day of January, 1920, and the costs of this action taxed in the sum of $69.60.

To all of which the defendants, being present by Wilmon Tucker, Esq., one of their attorneys, duly excepted, which exception was noted and allowed. Defendants are now allowed thirty days from this date within which to file and serve their bill of exceptions.

Done in open court this 5th day of April, 1920.

EDWARD E. CUSHMAN,
Judge.

O. K. as to form.

TUCKER & HYLAND and
RIGG & VENABLE,
Attys. for Defts.

[Indorsed]: Judgment. Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 5, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [30]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and A. G. BARNES,

Defendants.

Bill of Exceptions and Order Allowing Same.

BE IT REMEMBERED that on the 29th day of January, 1920, the above-entitled cause came on duly and regularly for trial in the above-entitled court before the Honorable Edward E. Cushman, one of the Judges thereof, sitting with a jury.

The plaintiffs were represented by Mr. Charles H. Hartge and Mr. L. T. Turner as their attorneys, and the defendants were represented by Mr. Wilmon Tucker and Mr. H. B. Rigg as their attorneys.

The jury having been duly and regularly empaneled and sworn to try the issues in the cause and counsel for the plaintiff having made his opening statement, the following evidence was thereupon offered:

Testimony of Etta Eichelbarger, on Her Own Behalf.

ETTA EICHELBARGER, called as a witness on her own behalf, being first duly sworn, testified as follows:

My name is Etta Eichelbarger. I am the wife of Stanley Eichelbarger, the other plaintiff. I was married 13 years ago and am now thirty-five years of age. In the month of June, 1917, I was thirty-three years old. At that date I was living at Buena, Washington, and went to Toppenish to see the circus. I went with my brother-in-law, Fred Eichelbarger, and Mr. and Mrs. Frank Hardy. Fred Eichelbarger bought the tickets for all of us. When we went in one row of seats was pretty well crowded, but there were some seats at the top that were not filled, and we thought we would go up along the side of the seats that were pretty well filled up, and I said, "I can't walk that narrow path," [31] and the attendant said, "Come down here and go up." We went down to a row of seats that were empty and then went up across the seats to the top. All the rest were ahead of me except Fred Eichelbarger. The seat board broke and I fell through. The seats were not very wide; were one above the other on kind of cleats. There was no aisle or other place to go up except across the seats, and they ran around the circus on each side of the reserved seats. There was no one sitting on the board that broke; they were sitting pretty close on the other side of the board. At the time I stepped on the seat that broke, there was no one else on it. I went right down through and

(Testimony of Etta Eichelbarger.)

the piece of board came down with me. The show people tore down the seats and took me out to a little tent that was fitted up as a hospital, and my foot was bound up and some liniment poured on it by a man they called "Doc." I don't know his name. Then the showmen carried me into one of the lower seats and gave me a box to put my foot on and I stayed for the circus. About ten o'clock he looked at the foot again, and then they took me in an automobile and took me to the Toppenish Hotel. Then a man came in that was introduced as Dr. Bice. He examined the foot and said that it was broken; Dr. Bice then set the foot and I went home the next day in my brother in law's automobile. On getting home I went to bed and remained there about six weeks; it was eight weeks before I was out of the house. During part of the last two weeks I was in bed. Dr. Bice put splints and then a wire cast on my foot. After I got up I was obliged to wear crutches for some time. Dr. Bice came from time to time during the first six weeks and twice after that. The last time he saw my foot was about the first week in October. Dr. Bice gave me directions how to handle it, and what to do with it , and I followed Dr. Bice's directions. I used crutches until after Thanksgiving, 1917, and during all that time I used care in putting my weight on my foot. From Thanksgiving until March of the following year I used, and it was necessary to use, a crutch and a cane; since March, 1918, I have used the cane that I now have with me. I suffer a great deal with the injury, particularly in the heel. [32]

(Testimony of Etta Eichelbarger.)

Starting in with the time of my injury at first the suffering occasioned thereby was worse on the inside of the foot, then it changed around and got in the toes and then back in the heel. Now, when I lie down it hurts mostly in the hip. I am not able to step squarely upon the foot; as a result, the other foot is very sore and very much calloused; I am not able to use the other foot in a natural way on account of having to stand in an unnatural way on the injured foot. Since the injury I have been very nervous and have had terrible headaches and suffered some from sleeplessness. I have had a great deal of pain in the back of my head and neck. I don't think I use my foot any better than I did when I first got around, only I am more used to it. After I am on it a few minutes it pains me, as soon as I get my shoes on and move around. Prior to the injury I worked about five days a week, earning 25¢ an hour, which was the going wages for that kind oif work; since that time I can work for three hours a day, possibly two days a week. After I have worked about three hours, I am unable to stand any longer. The only work I have done or can do since the injury is taking care of children and ironing; something I can sit down to, and can get very little of that kind of work, "and that kind of work only pays 30 cents an hour; the going wage for day work is 50 cents.

(Witness then removed her shoe and illustrated the manner in which she was obliged to walk.)

"Prior to the time I was injured my health had always been very good and my ankles, legs and feet were both in good condition and I walked naturally."

(Testimony of Etta Eichelbarger.)

Cross-examination.

"My husband works for the Archer Blower and Pipe Company. We had started on a trip east by automobile and stopped to visit. We had been in Buena two weeks, intending to leave on Monday and I got hurt Thursday. We were not going into the reserve seat section, but into the general admission section. We were not being conducted to a seat by an usher, but he showed us up the seats. He just stepped back and said, 'Pass on up to those seats.' There were people seated in front close to the ring, and we were going [33] to the upper seats behind them, stepping up the seats which were made of loose plank, lying on bents in the nature of steps, one above the other. The board broke about the length of my cane from the bent. The board that broke was about 10 or 12 feet from the ground. There was nothing on the ground where I fell. First I thought I just had a strained ankle. I got to the room in the hotel about eleven o'clock, or a little later at night. I had never had an injury to that ankle or foot before. From the hotel I went to Frank Hardy's house, which is where I remained for eight weeks. Then we lived in a tent at Buena until October, 1917, when we came back to Seattle, where we still live. I did not put any weight on my foot until after the cast was removed. I weigh about 195 now, and weighed about the same at the time of the accident; 190 is my normal weight. The callouses on the bottom of my other foot were not there at the time of the accident. I might have been in an automobile prior to the 21st of

(Testimony of Etta Eichelbarger.)

August, but I was not on a motorcycle. Since that time I have been with my husband on a motorcycle.

Redirect Examination.

The only automobile I went out in was my brother in law's and I did not go in that until after the cast was removed, and then I had my crutch and put no weight on my ankle and did not injure or hurt my foot in any manner. The first time that I think I went on a motorcycle was the last of September, but got no fall and did not hurt myself. I never put my foot down so as to throw my weight on it or injure it in any way. I have never wrenched or sprained it since the injury."

Testimony of J. H. Snively, for Plaintiff.

J. H. SNIVELY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

"I am a physician and surgeon; have been since 1905. [34] (Defense admits qualifications of witness.) I specialize in X-Ray work. On June 13th, 1918, I too two X-Rays of the plaintiff's foot, which correctly represent the condition of her foot as it then was. (X-Ray plates were then produced by witness and marked Plaintiffs' Exhibits 1 and 2.)

The WITNESS.—Exhibit 1 shows two views of the plaintiff's foot; the one to the right looking at the ankle from the front and the one to the left looking at the ankle from the side. This picture then is looking at the ankle from the front, and you will notice the large bone comes down, and at the lower part of

(Testimony of J. H. Snively.)

the large bone we have a little pointed process there and just at the base of that process you will notice a little crack running through, and that is where the lower end of the large bone is broken off. And then if you will follow the small bone down the leg you will notice that right opposite the articulation or the joint that the small bone takes an acute angle there and branches off to the side. That small bone should have run straight on down to about where my pencil is, and then up in there. That bone being broken off on the inside of the foot, the large bone and the small bone of the leg being broken off at the level of the joint permits the foot to be thrown outward. Now, looking at the other, the side view of the ankle, you will notice again the large bone coming down, and right at the bottom here this little piece broken off and then looking at the small bone you will notice right at the lower part the rounded head on it there showing a callous, a new bone that has been formed—I might add that has grown on there solid now—but you can see where the old bone was and distinguish it from the new bone that is thrown out there to heal it; so we have the ankle now solid in that position. Then coming back to the first one looking at the front view of the leg, if you will draw an imaginary line right through the center of the shaft of the large bone straight on down, you will notice that the foot is away off to the side of that imaginary line. Now, the weight of the [35] body is borne on that large bone and it should come right directly in the center of that large bone and be transferred to the

(Testimony of J. H. Snively.)

bone of the foot through its center, while here you will find that the weight-bearing surface comes away over to the side of the foot, permitting the foot to flop outward when the weight comes on it, so that it is not a weight-bearing surface any more. The weight comes on the side and the foot rolls outward and causes pain and still greater tendencies to deformity. We have here (witness refers to Exhibit 2) a normal ankle. If you will just put that up there I can explain that a little better perhaps.

Q. I hand you Plaintiffs' Exhibit 2—so marked—it is not introduced in evidence yet; if you will take that and explain to the jury, show the jury, the difference between that ankle as it now is and the normal ankle.

Mr. TUCKER.—Whose ankle is that?

The WITNESS.—This is another party. This is a normal ankle such as we ordinarily find.

Mr. TUCKER.—I will object to that as being incompetent and immaterial, making a comparison between this ankle and the ankle of somebody else that is normal. I don't think that would be admissible. It is incompetent.

The COURT.—Your objection being that it is not the other ankle of the plaintiff,

Mr. TUCKER.—It is an ankle of some other person.

The COURT.—Well, the jury will take that into consideration. It is simply being used by way of illustration to show how the bones are normally situated. Of course, it would not be of the same advantage to

(Testimony of J. H. Snively.)

you as if it had been the normal ankle of the plaintiff, but it may serve some purpose. I will overrule the objection.

Mr. TUCKER.—An exception.

A. I just simply want to show the line of the weight-bearing surface there. If you will draw this imaginary line from the center of the shaft of the large bone, you will notice it comes [36] in the center of the first bone of the foot and passes right on down through, through the center of the foot, showing that the weight there is amply sustained right in the center of that bone of the foot, which takes the weight from the leg, and in that way coming in the center, it of course forms a perfect formation for the weight; while in this one again, Mrs. Eichelbarger's, as you will notice I showed you, it comes away over to the side there, and the bone is tipped away off to an angle allowing the weight to come off to the side of the foot.

Mr. TURNER.—I offer these plates in evidence, if your Honor please.

The COURT.—They may be admitted.

Mr. TUCKER.—I object to plate number 2 as being incompetent, immaterial and irrelevant.

The COURT.—Objection overruled.

Mr. TUCKER.—An exception.

(X-Ray plates heretofore referred to marked Plaintiffs' Exhibit 1 and Plaintiffs' Exhibit 2.)

The WITNESS.—With the plaintiff's ankle in the condition it is in now it is impossible for her to use it in a normal manner. The deformity is permanent

(Testimony of J. H. Snively.)

and there would be no tendency to improvement. In fact, there will be a little tendency to wearing away of the joint if the weight were put on it until she will be walking almost on the inside of the foot. She will not be able to use that foot so as to put any weight on it. Any joint that has been as badly crushed and had torn ligaments and bones broken, as this you will get some limitation of motion, stiffness of the joint and a joint that would be very painful for a considerable length of time after the injury and then the soreness would gradually subside as the healing took place. I would imagine she would have more or less pain and rheumatism in that joint they usually do. If she tried to use it—put her weight on it, it would probably swell up and get sore and she would not be able to continue to use it. I just casually examined [37] her other foot—did not take any X-Ray of it. Having to use her injured foot in the manner I have described would tend to throw the weight on the other foot and compels her to use it in a different position by changing the angle of the body. This fracture is a very bad fracture and is what is called a Potts fracture. One that is very difficult to treat. Both bones broken and ligaments torn off round the ankle joint. You almost always have a permanent injury. There would be a limitation of motion in her ankle, as a result of the break. There would be just a little bit of shortening of the leg, as a result of the fracture; I would not say over a quarter of an inch—not enough to make any particular difference.

(Testimony of J. H. Snively.)

Cross-examination.

This Exhibit No. 2 is a plate of somebody's that I picked up in the office—I don't know whose. I have examined the left ankle of the plaintiff but not with an X-Ray. Just by looking at the two of them. I never saw her foot before the injury and I do not know whether she stood straight before the injury or not. There are people whose feet do not stand straight under their legs, because of flat feet, but I have taken a good many thousands of X-Rays of ankles and I do not remember of ever seeing any deformed ankle. The tibia, the large bone in the leg, is a little longer than it was before and the fibula, the short bone, is crushed and shattered and has shortened a little bit. There are operations that would improve the condition. Cutting off the tibia and putting the foot back in position and fastening it there and cutting the little *the little* bone off and fastening it down—if it were successful and there were no infection and a lot of other little things that might happen did not happen, you might run a little chance of getting a better foot. If it was done successfully that would improve it in some respects. I did not see the ankle until about a year after it was broken. The injury is such that it would be very difficult to get the bones back into position and put the foot straight in line.

Testimony of D. F. Bice, for Plaintiff.

D. F. BICE, called as a witness on behalf of the [38] plaintiff, being first duly sworn, testified as follows:

(Testimony of D. F. Bice.)

"I am a physician and surgeon (defense admitted qualifications). I treated the plaintiff, Mrs. Eichelbarger, in June, 1917. About June 21st, 1917, near midnight, I was called to one of the hotels to see the plaintiff and found upon examination that a Potts fracture had been sustained. I first reduced the fracture and applied splints, because of the possibility of swelling and injury to the tissue if I were to put on a cast at the time. Later, I think, about two days, I removed the splints and put on a wire cast. She was under my treatment for about two months. I continued to see her for six or eight weeks, and then later once or twice. I removed the cast. At that time I found the ankle in apparently straight position; that is, the foot straight in line with the tibia and the fractured part in apparent apposition to the bone above. I told her it was crushed and to especially avoid bearing any weight on it, as long as there was any pain, up to around three months. I removed the cast the latter part of August, and if I recall correctly, put on an adhesive strap to support the ankle and foot. The treatment which I gave is the approved and proper treatment for that sort of injury. I have to-day seen the X-Ray plates that were taken and have also again examined Mrs. Eichelbarger's ankle. The condition shown by the X-Ray plates and my examination is the result of the injury. The fact that a better result was not obtained is due, I believe, to the laceration of the ligaments of the ankle. The fracture was not difficult to reduce, but from studying the X-Ray

(Testimony of D. F. Bice.)

plates to-day, I would say that the location of the fracture was of such a nature that a good result could not be expected. The injury is permanent. She cannot use the ankle in a normal manner. Mr. [39] Sands asked me to treat the plaintiff. My bill was paid by the Al. G. Barnes Circus Co.

Cross-examination.

"As a matter of fact, Mr. Riggs paid me the bill and I don't know who paid it to him. I was paid by Mr. Rigg's check. The cast was taken off about two months after the fracture—I think it was the 20th or 21st of August. At the time I took it off it seemed to have produced a good result. I think I saw it twice after that. The last time that I saw it there was no change in the result, so far as I could see. I would not remember if there were any such change—at the time I saw her, about a month after I took the cast off, I thought I had a good result and discharged her as such. The condition in which the foot now is could be partly remedied. The extent of the improvement is questionable, but I feel that her ankle can be improved by surgical treatment. I would say there would be about 75% improvement, so that her limb would only be deteriorated 25%. The only danger there would be in having her undergo that treatment would be from the standpoint of infection, and if properly done by a surgeon that knows his business, the percentage of that risk is imperceptible."

Redirect Examination.

"I would, myself, in her condition undergo the

(Testimony of D. F. Bice.)

operation and I believe that a surgeon could assure the patient that she would get an improvement—the question is as to the extent of it. With the best results, it should be very nearly normal. I don't remember whether I gave her any instruction for a brace after I finished the treatment, although I think I might have; I sometimes do. The object of such treatment would be to take the strain from the ligaments joining the leg and foot bones and support them until the union had been more perfect from the ligament standpoint, because the [40] union of ligaments is slower than the union of bones. The operation I spoke of would incapacitate the patient for some weeks and entail quite a little expense."

Recross-examination.

"I think a good orthopedic surgeon would take from $250.00 to $350.00 for the work. It would take eight weeks to insure a good result and perhaps a little more for convalescence. Hospital, nurse and expenses would be $50.00 a week. She would be required to be at the hospital fully six weeks, which would amount to $300.00—six weeks more in a convalescent stage, during which she would not be required to be in the hospital but would be incapacitated. I would feel confident of getting good results—that is, she would have a more usable leg—would not need to walk with a cane or crutch. She might not limp after six to twelve months. I don't believe she would but cannot be sure about that."

Testimony of Lewis R. Dawson, for Plaintiff.

LEWIS R. DAWSON, called as a witness for the plaintiff, being first duly sworn, testified as follows:

"I am a physician and surgeon, practising in Seattle a great many years. I saw Mrs. Eichelbarger on the 13th of June, 1918. I saw the plates on the 16th of December, but I don't think I saw her again until today. I am not positive as to whether I saw her on the 16th of December or not. The plates were taken at my suggestion by Dr. Snively and I have examined them. When I examined her in June, 1918, the condition was practically the same as now; I couldn't see that it was any worse, but practically the same. Potts fractures are regarded as one of the most uncertain fractures to treat. Any fracture in which the bone is broken in connection with the joint is much harder to treat than when it is elsewhere, the difficulty being that in any Potts [41] fracture you have not only the break of the bone, but the tearing of the ligaments, and this particular fracture is a harder one than usual to treat. On account of the fact that she cannot bear much weight on the right foot, she has to bear most of it on the left and her crutch or cane and it brings an unnatural strain on that and to a certain extent an unnatural position, so that it would keep the left ankle irritated and weak. There is an unnatural callous on the inside of the left foot, due to the fact that it was put in an unnatural position in walking. The fact that she cannot use the limb freely without pain, would naturally effect her general nervous condition. She

(Testimony of Lewis R. Dawson.)

would be better off to have her foot taken off entirely and use an artificial foot than she is now. With her limb in its present condition, it is impractical for her to do heavy work, like day work in houses. It may gradually improve and she may have less pain, but on the other hand it may get worse and she may have even more, but leaving aside the question of an operation, she is permanently disabled. Operations on joints are notoriously uncertain because you are liable to have infection, or the movement of the joint is liable to be impaired, but in her case, I think an operation is preferable to going without it, because even if she got nothing better than a stiff joint, if she could bear her weight on it without pain, she would be better off than she is now. I heard Dr. Bice's testimony and I don't think it is possible that she could get such results that she would absolutely have no disability. I believe the best we could hope for would be a very decided improvement. If she had an operation by the best surgeon I would hope that the foot would be so that she would be able to bear her weight on it without pain. That would be a matter of months, probably a year or more, before she would be able to walk without pain and soreness. She would always be a cripple to some extent in that ankle and never have a perfect ankle. The expenses of a surgeon, hospital and other expenses for such operation would be somewhere between $500 and $1,000—[42] it would probably be more than $500.00. Any competent man would probably charge in the neighborhood of $300 for the

(Testimony of Lewis R. Dawson.)

operation and she would be entirely disabled from the operation three months and probably longer, and I don't believe it would be normal so far as normal use would be restored in less than six to nine months, or possibly a year. I have not been treating Mrs. Eichelbarger or prescribing for her. I was just asked to examine her and report on her condition. I did not advise her to have the operation that has been spoken of.

Testimony of J. F. Eichelbarger, for Plaintiff.

J. F. EICHELBARGER, being first duly sworn, as a witness on behalf of the plaintiff, testified as follows:

I am the brother of the plaintiff, Stanley Eichelbarger. I went with Mrs. Eichelbarger to the Barnes Circus at Toppenish. I paid for her admission. A young fellow from the circus directed us up to seats and we all went up the way he directed us. As we got within two rows of the top my sister-in-law stepped on a board and then it broke through. I made a clutch for her, being right behind her, and caught her under the arm and we both fell through. Nobody was standing on the seat near her at the time. One of the boards that broke fell down on one side, cutting my arm and going into the ground for about a foot. The seats were just laid on steps, one above the other, going clear around the tent. There were no aisles or other places to walk up—they had a man there to show you and they walked

(Testimony of J. F. Eichelbarger.)

right up across the seats; everybody did that at the direction of the attendants.

Cross-examination.

There were six of us, the plaintiff right ahead of me; I don't know who was ahead of her; I saw the board after it was broken. I did not examine the board as to whether there was anything wrong with it, but from the way the board split I should judge it was not a perfect board. It seemed otherwise to be a perfectly good board and broke right through. There was not a thing that would indicate to anybody of average perception [43] that it was not safe to walk on. My judgment would have been that it was just as safe as any of the other boards there to walk on."

Redirect Examination.

"I did not examine the board in particular, nothing only the depth in the ground."

Recross-examination.

"I should judge the board was about 6 or 8 or maybe 10 inches wide, something in excess of 1 inch thick, I know that. It was a painted board. It was not oak or hickory or ash; it must have been some light board because it broke with the grain the length of the board; instead of breaking crossways it broke slanting. I should judge the sliver ran down into the ground about a foot and that the board broke about that distance. The bents, I should say, from measuring the seats in Seattle were 12 feet apart.

(Testimony of Stanley Eichelbarger.)

The one that broke was no longer than any of the rest''

It is now stipulated between the parties plaintiff and defendant in open court that the allegations contained in the fourth paragraph of the complaint about the going rate of wages is admitted by the defendants.

Testimony of Stanley Eichelbarger, in His Own Behalf.

STANLEY EICHELBARGER, one of the plaintiffs, being first duly sworn, testified as follows:

''I am the husband of Mrs. Etta Eichelbarger, and one of the plaintiffs; have been married thirteen years. I was not present at the time she was hurt. Prior to that time her health was good and she was doing day work at private houses since 1914, averaging about five days a week. Since the injury the only work she has been able to do is take care of children or something; light work that she can sit down to do. She was troubled since then with sleeplessness at times and been bothered a good deal with pains in her ankle, hip and the back of her head. Prior to the injury she never had any trouble such as sleeplessness or nervousness.''

Thereupon the plaintiffs rested.

Thereupon counsel for the defense moved that judgment be entered in favor of the defendant, Al. G. Barnes, on the ground [44] that there was no evidence tending to show that said Al. G. Barnes was in any way liable for the injury suffered, and in the

alternative moved for a judgment of nonsuit in favor of the defendant, Al. G. Barnes, on the ground that there was no evidence tending to connect the said defendant with the accident.

Both of said motions were by the Court overruled, to which act of the Court the defendant, by his counsel, then and there excepted.

Thereupon the defendants, through their counsel, challenged the sufficiency of the evidence and moved for a judgment of dismissal on the ground, and for the reason, that there was no evidence tending to show any negligence, or want of performance of any duty, owing by the defendants to the plaintiffs; and for a judgment of nonsuit on behalf of defendants.

Said motion was overruled, to which ruling of the Court the defendants, by their counsel, then and there duly excepted. In the overruling of said motion, the jury being present, the Court made the following remarks:

"The jury being present, will understand that anything I say about my conclusion on the facts is not at all binding on them. You are called here to determine the facts in this case and any intimations that I give in ruling on this matter or about what I conclude on the facts, [45] if I do say anything about it, you will disregard. I am simply denying this motion, which leaves these questions of fact to you for your determination, and not concluding it in any way. But the attraction of gravitation is so uniform in its operation that it appears to me that the very fact that this board broke while the plaintiff was walking up those steps on these boards in the

ordinary way—we know that women, especially at her age and of her size, do not mount and jump as young fellows do, but that the board evidently was not subjected to any extraordinary strain other than the strain that could be put upon it by weight. That is, she did not do anything out of the ordinary, like anyone coming down the steps might have jumped from one board to another and put some great strain on it. It would not be altogether unreasonable to conclude from the mere fact that weighing 190 or 195 pounds, and the fact that the girls or women that were ahead of her did not fall, shows they had got off of the board, and Mr. Eichelbarger has explained how he was pulled into this by grabbing at her and trying to save her. He was not on the board. She was on the board and it is not unreasonable to conclude that the board broke under her weight of 190 or 195 pounds. Now, from what Mr. Eichelbarger has disclosed about the appearance of the board it might not be unreasonable to conclude that no test had been made of that board under a weight equal to hers, where it would have broken under the test, and her weight is not so extraordinary but what any reasonable person handling big shows and enormous crowds might well [46] anticipate that greater weight than hers would be at some time put upon the board either by two or more people hurrying up the steps to get seats or by some person of greater weight than hers stepping upon the board. But one matter that has not been mentioned makes it not absolutely necessary to invoke the doctrine of *res ipsa loquitur*. This witness says that board broke with

the grain; that is, it did not break across the grain. He says that one point of the board ran down into the ground. It is not unreasonable to conclude that that was a cross-grained board and that the cross-grain was concealed by the paint which the show company had put on the board for the sake of the appearance of the board, and when they painted it they could see it was cross-grained, even though they might not have seen it after they covered it with the paint. Motion denied.

Mr. TUCKER.—Allow an exception.

The COURT.—Allowed. Proceed with the defense.

Mr. TUCKER.—We rest.

The COURT.—Go to the jury.

ARGUMENTS TO THE JURY BY RESPECTIVE COUNSEL. [47]

Thereupon the Court instructed the jury as follows:

Instructions of Court to the Jury.

The COURT.—Gentlemen, you have had the case very frankly explained to you by counsel on both sides. You will take the complaint out with you and the pleadings in the case and have them with you in the jury-room, so that, if it is necessary to discover further what the issues are, you will have the pleadings there and can refer to them. Briefly the plaintiffs, that is, Mr. and Mrs. Eichelbarger, sue in this case on account of this injury that the plaintiff, Mrs. Eichelbarger, has sustained. In the course of my instructions I am liable to simply refer to Mrs. Eichelbarger as the plaintiff. The law requires that

where a married woman sues on account of an injury of this character it is necessary to join her husband with her in the suit.

The plaintiffs aver that these defendants are the owners of a circus, a traveling show, and that it gave a performance and appearance at Toppenish, and advertised and thereby invited people to attend it, and that the plaintiff, Mrs. Eichelbarger, went there and was shown by an usher of the defendants and directed to proceed up these seats and using them as a stairway or steps to a position at the back and above the ground, and that in going up there one of these seats or steps broke and she fell and hurt herself, and that the defendants were negligent in that that seat or step on which she was directed to walk was weak and defective, and the plaintiffs describe what injuries she sustained on [48] account of her fall when that plank or board broke. The defendants deny that they were at all negligent and deny the extent of the injuries set up in the complaint, and aver that the plaintiff herself was negligent in the manner in which she went up there and that that caused her injury. The plaintiffs then reply denying that she was in any way negligent. These are the issues you are called upon to try.

Under the circumstances disclosed by the pleadings and the evidence it was the duty of the defendants to exercise ordinary care to have safe and suitable seats or steps, if they were contemplating using the seats as steps, for the patrons of their show to walk up or back and up to secure seats high up on the bank of seats.

Ordinary care, as defined in this instruction and as applied to one later I will give regarding the plaintiff, Mrs. Eichelbarger, means the care that a person would ordinarily exercise under the same circumstances and should always be proportionate to the peril and danger reasonably to be apprehended from a want of proper prudence. Now, you will take all of the circumstances and the situation and what might reasonably be expected into account in determining what perils and danger were reasonably to be apprehended from a want of proper prudence in furnishing a safe and suitable board or plank for such use as this one was to be subjected to and might be expected to be subjected to. Failure to exercise ordinary care would constitute negligence, as I have said to you.

The burden of showing by a fair preponderance of [49] the evidence negligence on the part of the defendants and the extent of injury and damage on account thereof rests upon the plaintiffs, and unless they have shown by a fair preponderance of the evidence the sum of the negligence of which they complain on the part of the defendants, they can't recover.

The defendants in their answer having set up that the plaintiff was herself negligent, that is, that she failed to exercise ordinary care, and that that negligence on her part contributed to her injury, the burden of establishing by a fair preponderance of the evidence negligence upon her part rests upon the defendants unless she herself has shown it by her own evidence. The rule is that the plaintiffs could

not recover, no matter how negligent the defendants were, if the negligence of the plaintiff, Mrs. Eichelbarger, contributed to her injury. She herself was bound to exercise ordinary care, even though directed by the usher in proceeding to take her seat in the manner he directed in the circus, and if she failed to exercise ordinary care for her own safety under all the circumstances, and that failure on her part to exercise ordinary care contributed to and helped to cause her injury, and without such negligence on her part she would not have been injured, then the plaintiffs cannot recover even though the defendants were negligent as complained.

Logically in taking up the issues as made by these pleadings you would first dispose of this question about whether she was guilty of any want of ordinary [50] care which contributed to her injury. If you find by a fair preponderance of the evidence that she was, why, then you need not go any further; you would return a verdict for the defendants because of the fact that the plaintiffs had been barred from recovery by her contributory negligence. If you find that there is no preponderance of the evidence showing that she was guilty of contributory negligence which contributed to her injury, you would then go on and determine whether the defendants were shown to be negligent in the particular of which complaint is made. If there is no fair preponderance of the evidence to show that they were negligent in any of those matters, why, then you would stop in your deliberations and return a verdict for the defendants. But if you can find that the preponderance of the

evidence was, and if it is shown by a fair preponderance of the evidence that the defendants were guilty of negligence which caused her injury, why, then you would come to the last step in the case and determine the amount at which you would fix the recovery that should be allowed the plaintiffs. If you reach this stage in the case, as counsel fairly argued to you, you will, uninfluenced by any passion or prejudice against the defendants or any sympathy for the plaintiffs, allow such an amount as in the exercise of your best discretion will fairly compensate the plaintiffs for the injury which the plaintiff, Mrs. Eichelbarger, has suffered. It is perfectly proper for you to take into account any loss of time that directly resulted from this, any impaired earning capacity as the direct [51] result of the injury received at that time, the expense and nursing, if any there is shown or suffered, but you should have no intention, or not attempt in any way to punish the defendants. Your province is to, in a monetary way, compensate the plaintiff, Mrs. Eichelbarger, for the direct result of her injury, received through the negligence of the defendants, if such negligence has been shown and such injury has been shown—* * * you will disregard the Court's instructions about making any allowance up to date for doctors and nurses, because the amounts are not shown. * * *

The Court here instructed the jury as to the meaning of preponderance of the evidence, and upon the subject of the credibility of witnesses and then continued:

"Certain written instructions have been requested

that I will read to you. To some extent they repeat in substance a part of what I have already told you. You will not conclude from the fact that they are a repetition that the Court deems the repeated portion more important than any other part of the instructions. It is simply because it happens that way and the Court is trying to cover the whole case and that is all.

"I instruct you that it is the duty of one conducting a show or circus, to which the public is invited, upon the payment of an admission fee, to use ordinary care to see that such seats or other conveniences as are provided to be used by those attending such show or circus are safe and of such character that if used in the ordinary manner, persons so using them will not be injured; and if in this case you find that the defendants failed to exercise such care, but, on the contrary, negligently [52] provided a weak or defective seat upon which the plaintiff, Etta Eichelbarger, either by direction of the defendants or their employees having charge of directing guests where to go upon entering the said show or circus or in the use of the said seat for the purpose for which it was provided and intended to be used, stepped upon the said seat, and that the same broke and injured the plaintiff, Etta Eichelbarger, then the plaintiff in this case will be entitled to recover a verdict against the defendants, unless you find that the said Etta Eichelbarger was herself negligent and that such negligence was a contributing cause of such injury.

If, under the instructions of the Court, you find a verdict for the plaintiffs, the amount of your ver-

dict should be such amount as you find under the evidence to be the actual financial loss to the plaintiffs, both past and reasonably certain future loss, on account of the loss, if any, of the earning power of the plaintiff Etta Eichelbarger by reason of such injury, and such additional sum as you find from the evidence to be reasonable compensation to the plaintiff Etta Eichelbarger for such suffering and discomfort as may have been and will, with reasonable certainty, in the future be occasioned to her by said injury.

I instruct you that one who has been injured by the negligence of another and who has been treated by a reputable physician and discharged after completion of such treatment and who has followed the instructions of such physician as to the care of the injury is not [53] required to seek other treatment for the said injury unless and until such time when such facts are brought to the attention of the injured person as would convince a person of reasonable prudence that further treatment is necessary and until such time such person, if entitled to recover damages for such injury, could recover the full measure thereof for actual loss and suffering during such time, even though it should appear that by other treatment the injury might have been minimized or lessened at an earlier date.

You are instructed that it was the duty of the defendant Al. G. Barnes Show Co. in providing seats for its patrons to use ordinary care, by that I mean such care as an ordinarily prudent person would exercise in and about such a business.

The defendant Al. G. Barnes Show Co. was not required to use extraordinary care, prudence and foresight, but only ordinary care, about which I have heretofore instructed you.

If you believe from the evidence that the defendant Al. G. Barnes Show Co. used ordinary care in the selection of the material from which it constructed the seats used at the time in question, and that there were no apparent defects in the seat that broke which, in the exercise of reasonable care and caution, the said defendant should or might have discovered, and that the said accident and injury to the said plaintiff was caused by some latent and hidden defect which the said defendant, in the exercise of ordinary care, prudence and caution, could not have discovered, then [54] and in that event your verdict should be for the defendant. It is not enough for you to find that the seat broke and precipitated the plaintiff Mrs. Eichelbarger, to the ground below, thereby causing her injury, but you must go further and find that the defendant the Al. G. Barnes Show Company has been guilty of negligence; and that said defendant did not exercise that degree of care and caution as is ordinarily and customarily used by other men in carrying on and conducting a like business; but the facts and circumstances under which the board broke may be taken into consideration by you in determining whether or not an ordinarily careful inspection of the board would have disclosed some defect in it or weakness.

Mr. TUCKER (for the Defendants).—"I think my points have been covered, the points I have raised

so far, but for the sake of the record I would like an exception to instruction number one as requested by the plaintiff that your Honor read first, and defendants except to instruction number three as requested by the plaintiff and given by the Court and defendants except to instruction number four as requested by the plaintiff and given by the Court."

The COURT.—* * * Exception allowed where requested instructions were refused. Regarding other instructions I think the exceptions are too general.

The instructions referred to by Mr. Tucker are found in this bill of exceptions as follows:

I instruct you that it is the duty of one conducting a show or circus to which the public is invited, upon the payment of an admission fee, to use ordinary care to see that such seats or other conveniences as are provided to be used by those attending such show or circus are safe and of such character that if used in the ordinary manner, persons so using them will not be injured; and if in this case you find the defendants failed to exercise such care, but, on the contrary, negligently provided a weak or defective seat upon which the plaintiff Etta Eichelbarger, either by the direction of the defendants or their employees having [55] charge of conducting guests where to go upon entering the said show or circus, or in the use of the said seat for the purpose for which it was intended or provided to be used, stepped upon the said seat, and that the same broke and injured the plaintiff Etta Eichelbarger, then the plaintiff in this case will be entitled to recover a verdict against the

defendants, unless you find that the said defendant Etta Eichelbarger was herself negligent and that such negligence was a contributing cause of such injury.

I instruct you that one who has been injured by the negligence of another and who has been treated by a reputable physician and discharged after completion of such treatment and who has followed the instructions of such physician as to the care of the injury is not required to seek other treatment for such injury unless and until such time when facts are brought to the attention of the injured person as would convince a person of reasonable prudence that further treatment is necessary and until such time such person, if entitled to recover damages for such injury, could recover the full measure thereof for actual loss and suffering during such time, even though it should appear that by other treatment the injury might have been minimized or lessened at an earlier date.

You are instructed that it was the duty of the defendant Al. G. Barnes Show Company in providing seats for its patrons to use ordinary care; by that I mean such care as an ordinarily prudent man would exercise in and about such a business.

Thereupon the jury retired to consider of their verdict and thereafter and upon the same day returned and rendered their verdict in words and figures following, to wit:

"We the jury in the above-entitled cause find for the plaintiffs and assess their damages at the sum of $5,000.00."

Thereafter the defendants duly filed in writing their motion for a new trial herein, which said motion came on for hearing on the 5th day of April, 1920, and whereupon, the same having [56] been duly considered by the Court, was overruled, to which order of the Court the defendants by their counsel then and there duly excepted.

AND NOW, in furtherance of justice and that right may be done, the said defendants Al. G. Barnes Show Company and Al. G. Barnes tender and present to the Court the foregoing bill of exceptions in the above-entitled cause and pray that the same may be settled and allowed, signed *as* sealed by the Court and made a part of the record in the case.

TUCKER & HYLAND,
RIGG & VENABLES,
Attorneys for Defendants.

Service of copy hereof acknowledged this 3d day of May, 1920.

CHARLES H. HARTGE,
PRESTON, THORGRIMSON & TURNER,
Attorneys for Plaintiffs. [57]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Order Settling Bill of Exceptions.

The defendants, Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, having tendered and presented the foregoing as their bill of exceptions in this cause to the Court, in furtherance of justice and that right may be done them, and having prayed that the same may be settled, allowed, signed and sealed by the Court, and made a part of the record herein, and the Court having considered said bill of exceptions, and all objections and proposed amendments made therein, and being fully advised, does now sign, settle, seal and allow said bill of exceptions in this cause, and does order that the same be made a part of the records herein.

The Court further certifies that each and all of the exceptions taken by the defendants, as shown in said bill of exceptions, were at the time the same were taken allowed by the Court.

The Court further certifies that said bill of exceptions contains all the material matters and evidence material to each and every assignment of error made by the defendants and tendered and filed in this cause with said bill of exceptions.

The Court further certifies that said bill of exceptions was filed and presented to the Court within the time [58] provided by law.

The Court further certifies that the instructions set forth in said bill of exceptions were given by the Court over the exceptions of the defendants, as shown by the said bill of exceptions and that no other instructions were given by the Court other than the matters contained in said bill of exceptions and that said bill of exceptions shows all of the exceptions taken by said defendants to said instructions.

The Court further certifies that exhibits 1 and 2 forwarded with this bill of exceptions are the exhibits and the only exhibits offered at the trial of said cause.

Done in open court, counsel for the plaintiffs and the defendants being present and consenting thereto, this 7th day of July, 1920, at Seattle, in said District.

EDWARD E. CUSHMAN. [Seal]
Judge.

O. K.—TUCKER & HYLAND,
RIGG & VENABLES,
Attorneys for Defendants.
CHARLES H. HARTGE,
PRESTON, THORGRIMSON & TURNER,
Attorneys for Plaintiffs.

[Indorsed]: Bill of Exceptions and Order Allowing Same. Filed in the United States District Court, Western District of Washington, Northern Division. July 7, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [59]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Petition for Writ of Error.

To the Honorable, the Judges of Said Court:

Come now the above-named defendants Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, and respectfully show that on the 30th day of January, 1920, the jury empaneled in said cause found a verdict in favor of the plaintiffs and against these defendants in the sum of Five Thousand Dollars and that thereafter a motion for a new trial by these defendants was overruled, and that on the 5th day of April, 1920, a judgment was entered in favor of said plaintiffs and against these defendants in the sum of Five Thousand Dollars, together with costs.

And your petitioners feeling themselves aggrieved by said verdict and judgment as aforesaid and by the record, orders and proceedings in said cause, now herewith petition this Court for an order allowing them to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States and in accordance with the procedure of said Court to the end that said proceedings as hereinbefore recited may be reviewed, and that the errors appearing upon the face of the record of said proceedings and upon the trial of said cause may be reviewed and corrected by the said Circuit Court of Appeals and that for said purpose a writ of error and citation [60] issue herein as by law provided, and that pending the final determination of said writ that the same may operate as a supersedeas.

Your petitioners present herewith and file an assignment of errors and a bond in the sum heretofore fixed by the Court as a supersedeas bond.

RIGG & VENABLES,
TUCKER & HYLAND,
Attorneys for Defendants.

[Indorsed]: Petition for Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [61]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Order Allowing Writ of Error and Making Same Supersedeas.

The defendants, Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, having duly filed herein their petition praying for a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, together with their assignment of errors and their bond in the sum heretofore fixed by the Court as a bond on writ of error and as a supersedeas bond,—

IT IS ORDERED that a writ of error is hereby granted from the judgment herein to the Circuit Court of Appeals for the Ninth Circuit and that the same operate as a supercedeas pending the final determination of said writ.

Entered in open court this 17th day of May, 1920.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Order Allowing Writ of Error and Making Same Supersedeas. Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [62]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Order Fixing Supersedeas Bond.

The amount of the bond on writ of error having been heretofore fixed in the sum of Two Hundred and Fifty ($250) Dollars, and the defendants having moved the Court to fix an amount as a supersedeas bond, now, therefore,

IT IS ORDERED that upon filing a bond in the total sum of Six Thousand Two Hundred and Fifty ($6,250) Dollars, properly conditioned as a bond on writ of error and supersedeas bond, that the same shall operate as such supersedeas bond and bond on writ of error.

Entered in open court this 17th day of May, 1920.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Order Fixing Supersedeas Bond. Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [63]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW CO., a Corporation, and AL. G. BARNES,

Defendants.

Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, as principals, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound to Etta Eichelbarger and Stanley Eichelbarger, her husband, in the full sum of Six Thousand Two Hundred and Fifty ($6,250) Dollars, lawful money of the United States, for the payment of which we bind ourselves, our heirs,

executors, administrators and successors, jointly, severally and firmly, by these presents.

Dated this 14th day of May, A. D. 1920.

The condition of this obligation is such that whereas the said Etta Eichelbarger and Stanley Eichelbarger, her husband, did, on the 5th day of April, 1920, recover a judgment against the said defendants in the above-entitled court, and cause in the sum of Five Thousand ($5,000) Dollars, and costs, and whereas the said defendants Al. G. Barnes Show Company, a corporation, and Al. G. Barnes are about to sue out a writ of error in the Circuit Court of Appeals of the United States for the Ninth Circuit to review the said judgment, and which said writ of error will operate as a supersedeas,—

NOW, THEREFORE, if the above-bounden Al. G. Barnes Show Co., a corporation, and Al. G. Barnes shall pay the said judgment [64] together with interest and costs if the same be affirmed by said Circuit Court of appeals or if said writ of error is dismissed, together with any costs that may be taxed against them in said Court, and shall pay any judgment that may be rendered against them in said cause in said Circuit Court of Appeals or shall secure a reversal of said judgment, then this obligation to be void; otherwise to remain in full force and effect.

AL. G. BARNES SHOW CO.
AL. G. BARNES.
By RIGG & VENABLES,
TUCKER & HYLAND,
Its Attorneys.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[Seal] Attest: J. BAIRD,
Agent.

By A. W. WHALLEY,
Attorney in Fact.

Approved:

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Bond. Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [65]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,
Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,
Defendants.

Assignment of Errors.

Come now the defendants Al. G. Barnes Show Company, a corporation, and Al. G. Barnes and in connection with their writ of error filed herewith assign the following errors which the defendants aver and say occurred in the proceedings and at the trial

of the above-entitled cause in said court and upon which they rely to reverse and correct the judgment entered herein, and said defendants say that there is manifest error in said record in this:

1. The Court erred in admitting in evidence Plaintiffs' Exhibit 2, to the introduction of which these defendants objected and to the overruling of which objection the defendants then and there duly excepted.

2. The Court erred in overruling the motion of the defendant Al. G. Barnes for a directed verdict, to which action of the court these defendants then and there duly excepted.

3. The Court erred in overruling the motion of the defendant Al. G. Barnes for a judgment of nonsuit, to which action of the Court the defendants then and there duly excepted.

4. The Court erred in overruling the motion of these defendants for a directed verdict or in the alternative for a judgment of nonsuit, to which action of the Court the defendants then and there [66] duly excepted.

5. The Court erred in instructing the jury as follows: "But the facts and circumstances under which the seat broke must be taken into consideration by you in determining whether an ordinarily careful inspection of the board would have disclosed some defect in it." To which instruction of the Court the said defendants then and there duly excepted.

6. The Court erred in instructing the jury as follows: "I instruct you that it is the duty of one conducting a show or circus, to which the public is in-

vited upon the payment of an admission fee, to use ordinary care to see that such seats or other conveniences as are provided to be used by those attending such show or circus are safe and of such a character that if used in the ordinary manner, the person so using them will not be injured, and if in this case you find that the defendants failed to exercise such care, but on the contrary find that they negligently provided a weak or defective seat upon which the plaintiff either by direction of the defendants or their employees having charge of directing guests where to go upon entering said show or circus or in the use of said seats for the purpose for which it is provided or intended to be used stepped upon the said seat and that the same broke and injured the plaintiff Etta Eichelbarger, then the plaintiff in this cause will be entitled to recover a verdict against the defendants, unless you find that said Etta Eichelbarger was herself negligent and that such negligence was a contributing cause of the injury." To the giving of said instruction the defendants then and there duly excepted.

7. The Court erred in overruling the motion of these defendants to set aside the verdict of the jury and grant a new trial herein, to which ruling of the Court the defendants then and there duly excepted.

8. The Court erred in entering judgment in favor of the [67] plaintiffs and against the defendants.

And as to each and every of the said assignments of error the defendants say that at the time of the making of the order or ruling assigned as error the defendants at the said time asked and were allowed

an exception to the said ruling or order.

TUCKER & HYLAND,
RIGG & VENABLES,
Attorneys for Defendants.

[Indorsed]: Assignment of Errors. Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [68]

United States District Court, Western District of Washington.

No. 4735.

ETTA EICHELBARGER, et vir.,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, et al.,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will prepare transcript of record for C. C. A. containing summons, complaint as amended, petition bond and order on removal, order striking from complaint and stipulation, answer, reply, motion new trial and order denying same, docket entry lodging bill of exceptions, verdict, judgment, bill of exceptions and order allowing, petition for writ of error, order fixing bond, bond, assignment of errors, writ and citation.

TUCKER & HYLAND.
RIGG & VENABLES.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

TUCKER & HYLAND,
RIGG & VENABLES,
Attys. for Pltffs. in Error.

[Indorsed]: Praecipe for Transcript of Record. Filed in the United States District Court, Western District of Washington, Northern Division. June 1, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [69]

United States District Court, Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washing-

ton, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 69, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said writ of error herein from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiffs in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the [70] above-entitled cause, to wit:

Clerk's fee (Sec. 828, R. S. U. S.), for making record, certificate or return, 154 folios at 15c	$23.10
Certificate of Clerk to transcript of record—4 folios at 15c	.60
Seal to said Certificate	.20

I hereby certify that the above cost for preparing and certifying record amounting to $23.90 has been paid to me by attorneys for plaintiffs in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 9th day of July, 1920.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court. [71]

In the United States Circuit Court of Appeals for the Ninth Circuit.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,
Plaintiffs in Error,

vs.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,
Defendants in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Distirct Court before the Honorable Edward E. Cushman, one of you, between Al. G. Barnes Show Company, a corporation and Al. G. Barnes, the plaintiffs in error, and Etta Eichelbarger and Stanley Eichelbarger, her husband, defendants in error, a manifest error hath happened to the prejudice and great damage of the plaintiffs in error as

by their complaint and petition herein appears, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, so that you have the same at the said City of San Francisco within thirty days from the date hereof in the said Circuit Court of Appeals to be then and there held, that the records and proceedings aforesaid then and there being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 14th day of May, A. D. 1920, and of the Independence of the United States the one hundred and forty-fourth.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court for the Western District of Washington.

Service of the foregoing writ of error and receipt of a copy admitted this 17th day of May, 1920.

PRESTON, THORGRIMSON & TURNER,
CHAS. H. HARTGE,
Attorneys for Plaintiff. [72]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [73]

In the United States Circuit Court of Appeals for the Ninth Circuit.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Plaintiffs in Error,

vs.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Defendants in Error.

Citation on Writ of Error.

United States of America—ss.

The President of the United States of America to Etta Eichelbarger and Stanley Eichelbarger and Charles A. Hartge and Preston, Thorgrimson & Turner, Their Attorneys, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the said Al. G. Barnes Show Company, a corporation, and Al. G. Barnes are plaintiffs in error and Etta Eichelbarger and Stanley Eichel-

barger, her husband, are defendants in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington this 17th day of May, 1920.

EDWARD E. CUSHMAN,
United States District Judge.

[Seal] Attest: F. M. HARSHBERGER,
Clerk of the District Court of the United States for the Western District of Washington.

Service of the foregoing Citation and receipt of a copy hereof admitted this 17th day of May, 1920.

CHAS. H. HARTGE,
PRESTON, THORGRIMSON & TURNER,
Attorneys for Defendants in Error. [74]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [75]

[Endorsed]: No. 3521. United States Circuit Court of Appeals for the Ninth Circuit. Al. G. Barnes Show Company, a Corporation, and Al. G. Barnes, Plaintiffs in Error, vs. Etta Eichelbarger and Stanley Eichelbarger, Her Husband, Defendants in Error. Transcript of Record. Upon Writ of

Error to the United States District Court of the Western District of Washington, Northern Division.

Filed July 12, 1920.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and Al. G. BARNES,

Defendants.

Order Extending Time to and Including July 16, 1920, to File Record and Docket Cause.

For good cause now shown, IT IS ORDERED, that the time for filing the record in the above-entitled cause in the Circuit Court of Appeals be and the same hereby is extended for thirty days from this date.

Entered in open court this 16th day of June, 1920.

EDWARD E. CUSHMAN,
Judge.

O. K.—CHAS. H. HARTGE,
PRESTON, THORGRIMSON & TURNER,
Attorneys for Plaintiff.
RIGG & VENABLES,
TUCKER & HYLAND,
Attorneys for Defendants.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 16, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

No. 3521. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including July 16, 1920, to File Record and Docket Cause. Filed Jul. 12, 1920. F. D. Monckton, Clerk.

No. 3521

United States Circuit Court of Appeals

For The Ninth Circuit

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Plaintiffs in Error,

—vs.—

ETTA EICHELBARGER and STANLEY EICHELBARGER, her husband,

Defendants in Error.

WRIT OF ERROR TO UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF PLAINTIFFS IN ERROR

TUCKER & HYLAND, and
RIGG & VENABLES,
Attorneys for Plaintiffs in Error.
307 Lowman Bldg., Seattle, Washington.

THE ARGUS PRESS, SEATTLE

No. 3521

United States Circuit Court of Appeals

For The Ninth Circuit

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Plaintiffs in Error,

—vs.—

ETTA EICHELBARGER and STANLEY EICHELBARGER, her husband,

Defendants in Error.

WRIT OF ERROR TO UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF PLAINTIFFS IN ERROR

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No. 3521

United States Circuit Court of Appeals

For The Ninth Circuit

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Plaintiffs in Error,

—vs.—

ETTA EICHELBARGER and STANLEY EICHELBARGER, her husband,

Defendants in Error.

WRIT OF ERROR TO UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF PLAINTIFFS IN ERROR

THE FACTS.

Defendants in error sued for damages alleging that Plaintiffs in Error were the owners and operators of a large Circus, and that on the 21st day of June, 1917, they gave a large show and circus at

Toppenish, Washington; that Defendant in Error, Etta Eichelbarger, attended said show and paid her admission and was directed by an attendant in the employ of Plaintiff in Error to take a seat in a row of seats temporarily constructed under canvas and accessable only by walking from the lower seat up across the seats to the upper tiers of said row of seats and in pursuance of said directions said Etta Eichelbarger stepped upon said seats and went up near the top of said row of seats for the purpose of choosing a seat, and in so doing, said Plaintiff stepped upon a seat which was in said row or bank, which when stepped upon broke and precepitated the said Etta Eichelbarger down through said row or bank of seats to the ground beneath, a distance of about ten feet; that the said seat was weak and defective and the said accident was caused solely by the negligence of defendants in placing in said row or bank of seats the said defective and weak seat, and directing the said plaintiff, Etta Eichelbarger, as aforesaid to seek a seat in the said row or bank, and for that purpose to step upon the said seats; that the said Etta Eichelbarger was free from negligence and said accident was caused solely by said negligence of Plaintiffs in Error and that the said plaintiff was injured and damaged in the sum of Ten Thousand ($10,000) Dollars.

Transcript of Record, pages one to five, Plaintiffs in Error answered denying the material allegations of said complaint and pleading contributory negligence. Transcript of Record, pages 18

to 20, Defendants in Error replied denying contributory negligence. Transcript of Record, pages 21 to 22. The trial was had before Judge Cushman and a jury.

Defendant in Error, Etta Eichelbarger, testified in her own behalf; that she went to Toppenish to see the Circus; that her brother-in-law bought the tickets; that one row of seats was pretty well crowded, but there were some seats at the top that were not filled and we thought we would go up along the side of the seats that were pretty well filled up, and I said I can't walk that narrow path, and the attendant said come down here and go up. We went down to a row of seats that were empty and then went up across the seats to the top. All the rest were ahead of me except Fred Eichelbarger. The seat board broke and I fell through the seats; the seats were not very wide; were one above the other on kind of cleats; there was no aisle or other place to go up except across the seats and they ran around the circus on each side of the reserved seats. There was no one sitting on the board that broke; they were sitting pretty close on the other side of the board; at the time I stepped on the seat that broke there was no one else on it. I went right down through and the piece of board came down with me. Transcript of Record, pages 30 and 31.

CROSS EXAMINATION.

We were not going into the reserve seat section but into the general admission section; we were not being conducted to a seat by an usher, but he

showed us up the seats. He just stepped back and said, "Pass on up those seats." We were going to the upper seats, stepping up the seats which were made of loose plank, lying on bents in the nature of steps one above the other; the board that broke was about 10 or 12 feet from the ground; there was nothing on the ground where I fell. I weigh 195 now and weighed about the same at the time of the accident. Transcript of Record, page 33.

J. F. Eichelbarger testified in behalf of plaintiff, that he went with Mrs. Eischelbarger to the Barnes Circus at Toppenish; that he paid for her admission; that a young fellow from the Circus directed us up to seats and we all went up the way he directed us. As we got within two rows of the top my sister-in-law stepped on a board and then it broke through. I made a clutch for her, being right behind her, and caught her under the arm and we both fell through. Nobody was standing on the seat near her at the time. One of the boards that broke fell down on one side cutting my arm and going into the ground for about a foot; the seats were just laid on steps one above the other, going clear around the tent. There was no aisle or other places to walk up, they had a man there to show you and they walked right up across the seats; everybody did that at the direction of the attendants. Transcript of Record, pages 45 and 46.

CROSS EXAMINATION.

I saw the board after it was broken. I did not examine the board as to whether there was any-

thing wrong with it, but from the way the board split, I should judge it was not a perfect board. It seemed otherwise to be a perfectly good board and broke right through; there was not a thing that would indicate to anybody of average preception that it was not safe to walk on. My judgment would have been that it was just as safe as any of the other boards there to walk on. I did not examine the board in particular, nothing only the depth in the ground. I should judge the board was about six or eight or maybe ten inches wide, something in excess of one inch thick; I know that it was a painted board; it was not oak, or hickory or ash; it must have been some light board because it broke with the grain the length of the board, instead of breaking crossways it broke slanting. I should judge the sliver ran down into the ground about a foot and that the board broke about that distance. The bents, I should say from measuring the seats in Seattle, were 12 feet apart. The one that broke was no longer than any of the rest. Transcript of Record, pages 45 to 47.

The above is all the evidence that was introduced tending to show negligence of the Plaintiffs in Eror.

At the close of plaintiff's evidence the Plaintiff in Error challenged the sufficiency of the evidence and moved for a judgment of dismissal for the reason that there was not sufficient evidence tending to show negligence on the part of Plaintiffs in Error, and for a judgment of non-suit; that

motion was denied and an exception taken. Transcript of Record, page 48.

The verdict of the jury was for the plaintiffs in the sum of Five Thousands ($5,000) Dollars. Transcript of Record, page 59.

A motion was filed for a new trial in said cause and denied by the court. Transcript of Record, pages 23 to 25.

Ajudgment was entered upon the verdict. Transcript of Record, page 27.

ASSIGNMENTS OF ERROR.

I.

The court erred in giving the jury the following instruction:

> "If you believe from the evidence that the defendant, Al. G. Barnes Show Co., used ordinary care in the selection of the material from which it constructed the seats used at the time in question, and that there were no apparent defects in the seat that broke which, in the exercise of reasonable care and caution, the said defendant should or might have discovered, and that the said accident and injury to the said plaintiff was caused by some latent and hidden defect which the said defendant, in the exercise of ordinary care, prudence and caution, could not have discovered, then (54) and in that event your verdict should be for the defendant. It is not enough for you to find that the seat broke and precipitated the plain-

tiff, Mrs. Eichelbarger, to the ground below, thereby causing her injury, but you must go further and find that the defendant the Al. G. Barnes Show Company, has been guilty of negligence; and that said defendant did not exercise that degree of care and caution as is ordinarily and customarily used by other men in carrying on and conducting a like business; but the facts and circumstances under which the board broke may be taken into consideration by you in determining whether or not an ordinary careful inspection of the board would have disclosed some defect in it or weakness." Transcript of Record, page 57.

II.

The court erred in denying Plaintiffs in Error's motion for a dismissal and for a non-suit at the close of plaintiff's evidence, for the reason that the facts and circumstances proven did not authorize the inference of negligence on the part of Plaintiffs in Error, and for the reason that no negligence was shown on the part of Plaintiffs in Error and for the reason that the facts and circumstances proven were just as consistent with the theory that the damage was caused by an accident for which the Plaintiffs in Error were not responsible, and for the reason that the evidence did not justify the submission of the case to the jury.

III.

The evidence is not sufficient to sustain either

the verdict or the judgment, and the verdict and judgment are contrary to law.

IV.

The court erred in denying plaintiff's motion for new trial for the reason embodied in said motion, and entering judgment on said verdict to each and all of these assignments the Plaintiffs in Error duly excepted respectively.

ARGUMENT.

I.

The first assignment of errors is based upon the instruction of the court to the jury set out in said assignment. In that instruction the jury are told, "It is not enough for you to find that the seat broke and precipitated the plaintiff, Mrs. Eichelbarger, to the ground below, thereby causing her injury." We respectfully submit that that is all that the plaintiff proved in this case. The circumstances surrounding the breaking of the board, it would seem does not aid in any manner to show negligence on the part of Plaintiffs in Error. The last paragraph of said instruction is as follows: "But the facts and circumstances under which the board broke may be taken into consideration by you in determining whether or not the ordinarily careful inspection of the board would have disclosed some defect in its weakness." In the first paragraph here quoted the jury are told that it is not enough for the plaintiff to simply prove that the seat broke. In the second paragraph the jury are told that they

may take into consideration the facts and circumstances under which the board broke. We submit these two statements are contradictory because there are no circumstances, there are no facts in addition to the fact that the board broke. The instruction is contradictory in saying that the breaking of the board is not enough, and in saying that they may take into consideration the facts and circumstances under which the board broke when there are no facts or circumstances which would in any manner throw light on the question of whether a careful inspection of the board would have disclosed its defects. The authorities cited under the following paragraph of this brief have a clear bearing on the erroneousness of that instruction, which we urge is prejudicial error.

II.

The second, third and fourth assignments of error all bear upon the same question and may be considered together. The question is, "Did the mere breaking of this board justify an inference by the jury of actionable negligence?" In other words, when the only proof is that the board broke when stepped upon does the doctrine or *res ipsa loquitur* apply and furnish from the mere breaking of the board a presumption of negligence. If not, the motion for a non-suit should have been sustained because the evidence was not sufficient to justify the submission of the question to the jury, and the motion for a new trial should have been sustained for the same reason.

As we understand this proof, it is only shown that when the Defendant in Error stepped upon the board it broke and precipitated her to the ground and injured her. The mere breaking of the board, as the trial court told the jury, and which is the law, will not justify an inference of negligence, or make the doctrine of *res ipsa loquitur* applicable to this case. *Res ipsa loquitur* does not dispense with proof of negligence on the part of the plaintiff, and only applies in cases where the breaking of the board is surrounded by sufficient circumstances tending to show negligence, as will authorize the presumption of negligence from those circumstances coupled with the breaking of the board. There is no circumstance tending to show that this board was not properly selected. The facts and circumstances do show that the board was a painted board, one of the regular seats out of many hundred in all probability that was used in the circus, it had been in use and had stood the test. The proof does show in the testimony of Mr. Eichelbarger that the appearance of the board showed no defects. Such defects as there were in that board were covered by the paint. There is nothing even tending to show that an inspection of the board would have revealed the defect, or that an inspection was not made. The facts and circumstances surrounding the breaking of the board show nothing from which negligence could have been inferred and there are no facts or circumstances pointing to negligence, hence we say

the maxim of *res ipsa loquitur* does not apply.

That maxim does not change the burden of proof. It is an exception to the general rule that the plaintiff must prove negligence. That maxim is and should be applied with caution. It only applies when the accident is of a kind that it could not have happened unless there was negligence. In order for there to be negligence in this case a bad board must have been originally installed, or if it afterwards became weak such an inspection as an ordinarily careful and prudent person would have made under like circumstances must have disclosed the weakness. The proof must show prima facie that the injury could not have happened without negligence on the part of the defendant. We subthat there is no showing that this board was originally defective, that it was not inspected, or that an inspection would have disclosed the weakness. The plaintiff was bound to show that an inspection would probably have shown the defect. Negligence cannot be left to conjecture from the breaking of the board which is all the proof shows, the inference is just as potent that an inspection would not have shown the defect as it is that the defendant should have known it and avoided the injury.

If it is the law that the mere breaking of the board will not justify the inference of negligence or the application of the doctrine of *res ipsa loquitur*, then this judgment should be reversed because there is no potent facts or circumstances outside of the breaking of the board from which negligence would

be inferred. If there are any such facts and circumstances, what are they, and what weight and worth do such facts and circumstances have when separated from the breaking of the board?

There is no proof that this accident could have been avoided with proper diligence on the part of the Plaintiffs in Error. If this judgment must stand, it is because the mere breaking of the board is prima facie evidence of negligence; that is based upon the presumption without any proof whatever of circumstances or otherwise to sustain it. That an inspection such as an ordinarily careful person would make under all the circumstances would have discovered the defect. One presumption based upon another presumption. Such ought not to be the law. The doctrine of *res ipsa loquitur* is generally applied to cases only where the defendant is bound to use extraordinary care, where he is in the attitude of being the next door neighbor to an insurer.

The manner in which the board broke has no tendency to prove negligence. Speaking from common experience only, we do not believe that any man can tell whether a board is going to break with the grain, or across the grain; whether one end of the board is going to have a splinter on it or not. There would seem to be nothing in the manner in which the board broke that would tend to show negligence. The rule is that the acts of the defendant must speak negligence, and that negligence cannot be inferred from the mere happening of the ac-

cident. Applying that rule to the case at bar, there is clearly no liability. There must be some proof of negligence before the inference of negligence will arise.

The defendant, so far as the plaintiff's proof is concerned was in no better position, in the case at bar, to explain why this board broke than was the plaintiff. It was a latent defect and the proof shows only that the plaintiff was injured by an accident. The proof must necessarily point to negligence before *res ipsa loquitur* has any application. Such would not seem to be the tsatus of the proof in the case at bar.

Res ipsa loquitur being an exception to the general rule, should be applicable only when the nature of the accident itself not only supports an inference of defendant's negligence, but excludes all others.

The Plaintiffs in Error were engaged in a lawful occupation by lawful means and authorized instrumentalities, and until there is some proof of negligence, they ought not to be held liable. The court ought to hold that the inference to be drawn from the proof in the case at bar, was that of an unavoidable accident. At least the presumption was no more favorable to the doctrine of negligence than it was to that of an unavoidable accident.

It would seem that the complaint does not state a cause of action. The mere allegations that the seat was weak and defective and the said accident was caused solely by the negligence of defendant

in placing in said row or bank of seats, the said defective, weak seat, and directing the plaintiff to seek a seat in said bank is not sufficient; I submit that the word "negligently" ought not to supply the necessary allegations that the defendant acting as a reasonably prudent man should have known that it was weak and defective and not placed it there. They have pleaded all that their proof sustains; barring the word "negligently" there is nothing in that complaint tending to show that the defendant in this action did not exercise ordinary care; and last having specifically pleaded the negligence that they relied on, the maxim of *res ipsa loquitur* has no application.

We respectfully submit that the following authorities clearly hold that the motion to dismiss and for a non-suit should have been sustained; that the evidence was not sufficient to authorize the submission of this case to a jury; that the plaintiff did not discharge the burden which rested upon her of showing facts and circumstances which necessarily pointed to negligence.

> "The rule of *res ipsa loquitur* is always applied with caution and only where there is an absence of positive proof of any definite act of negligence or want of skill, though the accident itself is of an unusual and extraorinary character and one not likely to occur without such cause." *Kight v. Metropolitan Ry. Co.*, 21 App. D. C. 494.
>
> "Where in an action for personal injuries

the facts are such that the accident was due to a cause other than the negligence of the defendant, could have been drawn as reasonable as an inference that the accident resulted from defendant's negligence, the doctrine of *res ipsa loquitur* does not apply and plaintiff cannot rely upon mere proof of the facts and circumstances and require defendant to show that he was not negligent." *McGrath v. St. Louis Transit Co.* (Mo.), 94 S. W. 872.

"Where in an action for personal injuries sustained by the falling of a staging, the fall is not prima facie evidence of negligence." *Parsons v. Hecla Iron Works* (Mass.), 71 N. E. 572.

"In an action to recover damages sustained by the falling of certain iron trusses which the defendant was placing in the roof of a building, evidence of the mere fact that the trusses fell and injured plaintiff's intestate, is not in itself proof of negligence on the part of defendant." *May v. Berlin Iron Bridge Co.*, 60 N. Y. S. 550.

"Where plaintiff alleged and relied on negligence of defendant in making repairs of a boiler which exploded killing her husband, the doctrine of *res ipsa loquitur* has no application." *Clark v. Gramby Mining & Smelting Co.* (Mo.), ~~182 S. W. 109~~. 183 Sw. 1099

"Where plaintiff in an action for negligence specifically sets out in full in what the

defendant's negligence consisted, the doctrine of *res ipsa loquitur* has no application." *The Great Northern*, 251 Federal 826.

"Where plaintiff in action for negligence sets out specifically in what negligence of the defendant consisted, doctrine of *res ipsa loquitur* has no application." *White v. Chicago G. W. R. Co.*, 246 Federal 427, 158 C. C. A. 491.

"Doctrine of *res ipsa loquitur* means that circumstances connected with accident are of such unusual character as to justify in absence of other evidence inferences that accident was due to negligence." *Francey v. Ruthland Ry. Co.* (N. Y.), 119 N. E. 86.

"Where the thing which causes an injury is under the management of defendant, and the accident would not have ordinarily happened if those who had such management had used proper care, under the doctrine of *res ipsa loquitur* proof of the happening of the event raises a presumption of the defendant's negligence and casts upon him the burden of showing that ordinary care was exercised; but where the circumstances leave room for a different presumption the reason of the rule fails, and the doctrine cannot be invoked." *McGowan v. Nelson*, 92 P. 40.

"The doctrine of *res ipsa loquitur* does not apply where the cause of the accident complained of is fully explained." *Fizgerald v. Goldstein*, 107 N. Y. S. 614.

"Except where the acts of the defendant speak negligence it cannot be inferred from the mere happening of the accident." *Lone Star Brewing Vo. v. Willie*, 114 S. W. 186.

"The "res" in the maxim, "*Res ipsa loquitur*" is not simply an accident resulting in injury but the accident and the surrounding circumstances, and the doctrine does not permit a recovery without some proof of negligence, but, if the occurrence could not have happened without negligence according to the ordinary experience of mankind, the doctrine is applied, though the precise omission or act of negligence is not specified." *Robinson v. Consolidated Gas Co. of New York*, 86 N. E. 805.

"The mere happening of an accident is not always sufficient to charge one with negligence under the doctrine of *res ipsa loquitur*, and the presumption does not arise unless the surrounding circumstances, necessarily brought into view by showing how the accident occurred, contain, without further proof, evidence of defendant's duty and of his neglect." *Feingold v. Ocean S. S. Co. of Savannah, Ga.*, 113 N. Y. S. 1018.

"Where defendants undertook to underpin the foundation of a building, and while doing so the building fell, such facts alone did not establish negligence, as defendants were not insurers of the successful performance of the work without fault or error of judgment, but

were only liable for negligence, bad faith, or dishonesty." *Kennedy v. Hawkins*, 102 P. 733.

"The part of the rule *res ipsa loquitur* that where defendant is in a position to clear away all doubts as to its alleged negligence, and fails to do so, it would be presumed that negligence existed, only applies where plaintiff has proved a state of facts which, while not free from question, is yet sufficient in the absence of explanation to justify an inference of negligence on the defendant's part, and does not apply where the facts shown are equally consistent with the hypothesis that the injury was caused by the negligence of the injured person, or by that of defendant, or by both combined." *Texas & P. Coal Co. v. Kowsikowsiki*, 125 S. W. 3.

"Since the doctrine of *res ipsa loquitur* involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, it is applicable only when the nature of the accident itself not only supports an inference of defendant's negligence, but excludes all others." *Lucid v. E. I. Du Pont De Nemours Powder Co.*, 199 F. 377, 118 C. C. A. 61.

"That plaintiff and the seat of the buggy on which he sat fell backwards by the breaking of fastenings, when the horse started suddenly, held not to show the owner of the buggy

guilty of negligence." *Davis v. Crisham*, 99 N. E. 959.

"To make the *res ipsa loquitur doctrine* applicable, the circumstances surrounding the accident must, without further proof, furnish sufficient evidence of defendant's negligence." *Hardie v. Charles P. Boland Co.*, 98 N. E. 661.

"The expression of "*Res ipsa loquitur*" is a shorthand method of showing that the circumstances attendant upon an occurrence are of such a character as to speak for themselves in inferring the negligence and the cause of the disaster." *Canode v. Sewell*, 182 S. W. 421.

"The plaintiff, as an employe of F. & Co., was at work on the premises of the defendants in helping to set up a saw mill which the defendants had purchased of F. & Co. While so at work, a steam-boiler, owned and used by the defendants on the premises to run the saw mill, exploded and injured the plaintiff. Held, that in an action for damages the mere fact of the explosion did not raise a prima facie presumption of negligence on the part of the defendants. *Huff v. Austin* (Ohio), 21 N. E. 864.

"In an action against a railroad company for damages from fire alleged to have been set by sparks from defendant's locomotive, the burden is on the plaintiff to prove, not only that the fire was caused by sparks from defendant's engine, but that the emission of such

sparks was due to defendant's negligence." *Garrett v. Southern Ry. Co.*, 101 Federal 102.

We respectfully submit that the Defendants in Error have neither by proof nor presumption established neglicence, and that the judgment should be reversed and the cause dismissed.

TUCKER & HYLAND, and

RIGG & VENABLES,

Attorneys for Plaintiffs in Error.

United States Circuit Court of Appeals

For the Ninth District

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,
Plaintiffs in Error,
vs.
ETTA EICHELBARGER and STANLEY EICHELBARGER, her husband,
Defendants in Error.

No. 3521

BRIEF OF DEFENDANTS IN ERROR

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911 Lowman Bldg., Seattle, Washington.

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United States Circuit Court of Appeals

For the Ninth District

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,
Plaintiffs in Error,
vs.
ETTA EICHELBARGER and STANLEY EICHELBARGER, her husband,
Defendants in Error.

No. 3521

BRIEF OF DEFENDANTS IN ERROR

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ARGUMENT.

I.

The first error assigned by Plaintiff in Error is the giving of an instruction by the court to the jury.

There are three conclusive reasons why this assignment of error cannot be sustained.

In the first place the giving of the instruction which is assigned as error in the brief was not excepted to upon trial. At the time of giving the instructions to the jury, counsel for Plaintiff in Error excepted to the refusal of the court to give certain instructions, and also to the giving of instructions numbers 1, 3 and 4 as requested by Defendant in Error, the exceptions being taken simply by reference to the numbers of the requests. The instructions contained in those numbers are set forth in the Bill of Exceptions, and it clearly appears that the instruction complained of in the brief is neither instruction 1, 3 or 4. (Transcript of Record, pp. 58, 59.)

In the second place the only exceptions taken to the giving of instructions at all was by number, and the court disallowed the exceptions as being too

general. (Transcript of Record, p. 58.) This disallowance was proper as such exceptions are insufficient.

> *U. S. Coal Co. vs. Pinkerton,* 169 Fed. 536;
> *Pa. Co. vs. Sheeley,* 221 Fed. 901;
> 38 Cyc. 1802.

In the third place, the instruction was at least as favorable to Plaintiff in Error as plaintiff was entitled to and the only objections that could have been made to it must have been made by the Defendant in Error. The instruction quoted in the brief was not in fact requested by the Defendant in Error.

In discussing this assignment of error, counsel at page 11 of the brief complains that there were no facts or circumstances under which the board broke which could be taken into consideration by the jury, and that the only fact for the jury's consideration was the breaking of the seat, which the court told the jury was not sufficient to create liability, and counsel therefore contends that the instruction is contradictory in itself.

We are unable to agree with counsel. It appears by the testimony quoted in the brief of Plaintiffs in Error and set forth in the Bill of Exceptions,

that at the time the seat broke, although it was some twelve feet in length between supports and therefore calculated to seat a number of people, that there was no weight upon it except of the Defendant in error. That a seat should break under an unusual load, or one which it is not calculated to support, would not be evidence of negligence, but when one paying admission to attend a public performance is directed by the party giving the performance to walk across a row of seats and one of those seats breaks under the weight of one person stepping in the usual manner upon such seat, the breaking of the seat, taken in connection with the weight placed upon it, the fact that it was used in the usual manner and that it was obviously calculated and intended to carry a much heavier load, is certainly sufficient prima facie to prove negligence. This will, however, be more fully discussed in the second point of the brief. As the instruction was not in fact excepted to at the trial, Plaintiff in Error cannot complain of it here.

II.

The second point relied upon for reversal is insufficiency of the evidence to justify a verdict. The

argument in support of the contention is based upon the claim that there was no sufficient proof of negligence of the Plaintiffs in Error.

It is contended that the doctrine of *res ipsa loquitur* does not apply to the case, first, because it is not applicabble to the facts involved and second, because it is contended that the specific acts of negligence relied upon by Defendants in Error in their complaint, were set forth and that the doctrine of *res ipsa loquitur* does not apply to a case in which specific negligence is alleged. We will discuss these points in their order first, however, discussing somewhat in detail the authorities cited by Plaintiffs in Error.

In the first place we desire to call to the court's attention the fact that not a single case has been cited by Plaintiffs in Error involving the responsibility of the proprietor of a place of public amusement to furnish a safe place to those paying admission and attending the performance by invitation of the proprietor. The cases cited involve entirely different situations. We will review each of the cases cited by Plaintiffs in Error.

KIGHT vs. METROPOLITAN RY. CO., 21 App. D. C. 494—

While in discussing *res ipsa loquitur* the Court uses the language quoted, it does not pass upon the applicability of the doctrine to the facts of that case, holding that irrespective of that question there was sufficient positive evidence of negligence to go to the jury. The case was one of an injury to a street car passenger from a stampede caused by a fuse blow-out.

McGRATH vs. ST. LOUIS TRANSIT CO. (Mo.), 94 S. W. 872—

The plaintiff, a track workman, was injured by a car. The complaint specifically alleged failure to give warning and negligent running into plaintiff. The court held, as stated in the brief, to the effect that where from the facts as shown an inference of negligence other than that of the defendant was just as reasonable as an inference of defendant's negligence, *res ipsa loquitur* would not apply, which holding was of course correct. As a matter of fact the court further held that in that case the plaintiff was guilty of contributory negligence as a matter of law.

PARSONS vs. HECLA IRON WORKS (Mass.), 71 N. E. 572.

The quotation from this case does not, in our opinion, correctly state the conclusion of the court. What the court held was that where

it had been stipulated in the case that the staging was entirely firm when first put up and where the evidence itself clearly showed the cause of the fall, which was the removal of braces, the doctrine of *res ipsa loquitur* could not be involved.

MAY vs. BERLIN IRON BRIDGE CO., 60 N. Y. S. 550—

This was an action brought by a workman injured by the fall of trusses which were being put in place in the construction of a building. The doctrine of the case has no application to an injury resulting from a completed structure put to its ordinary use at the invitation of the owner to one who pays admission.

CLARK vs. GRANBY MINING & SMELTING CO. (Mo.), 183 S. W. 1099—

This was a case of a gratuitous lender of a boiler, who voluntarily repaired it. The plaintiff alleged specific negligence in placing a riveted stay bolt in the boiler, which allegation was not supported by the proof. The court held that *res ipsa loquitur* did not apply for two reasons, first, because the specific act of negligence relied upon was alleged and not proved and second because the defendant was not in control and management of the boiler in such a manner as to make the doctrine applicable.

THE GREAT NORTHERN, 251 Federal 826—

This is a case decided by this court. The case was one involving the fall of a passenger

on board ship on the bathroom floor. There was no showing of faulty construction. The court held there was no evidence of negligence and that the plaintiff had assumed the risk. Among othe grounds of the court's decision the court made the statement set forth in plaintiff's brief, that—"where plaintiff in an action for negligence *specifically sets out in full* in what the defendant's negligence consisted, the doctrine of *res ipsa loquitur* has no application." (Italics are ours.) It appears by an examination of the case that plaintiff in the case alleged negligent construction of the bathroom, giving at some length the details of construction, followed by the conclusion that the bowl was slippery and difficult to stand upon and that there was no provision for any hand hold, nor was there a rubber mat. The trial court found that the plaintiff did not slip at all on the bottom of the basin, but because of the lurching of the vessel when he was about to step into the bathroom and that it was caused without any negligence of the vessel.

It is quite obvious from the facts of the case that without regard to the allegations contained in the complaint there was no opportunity for the application of the doctrine of *res ipsa loquitur*. Conceding for the moment, for the purpose of the argument, however, that it is the rule that where one alleges specific negligence, the doctrine of *res ipsa loquitur* cannot be relied upon by plaintiff, we submit the rule has no application to the case at bar. The allegations made by Defendants in Error in this case as to negligence follow a statement of the fact that the Plaintiffs in Error were conducting a

show, that the Defendant in Error paid admission and was directed by Plaintiffs in Error to walk across a row of seats, that she stepped upon one of those seats which broke and precipitated her to the ground below and that the seat was weak and defective. The allegation of negligence is that—"said accident was caused solely by the negligence of the defendants in placing in the said row or bank of seats the said defective and weak seat, and in directing the said plaintiff, Etta Eichelbarger, as aforesaid, to seek a seat in the said row or bank, and for that purpose to step upon the said seats."

We submit that there is here no allegation of specific negligence. It amounts to no more than a statement that the Defendant in Error was directed by Plaintiffs in Error to step upon the seat and that it broke, that it was weak or defective follows from its breaking. It was necessary to allege that she was directed to step upon it in order to connect the Plaintiffs in Error with the negligence causing her injury. Why it broke, what the defect or weakness was, how it was caused, why it was not discovered and removed, are all left at large, the complaint alleging only the ultimate facts upon which her recovery depends, to-wit: that the Plaintiffs in Error having received her admission fee negligently placed her upon a weak or defective seat which broke under her weight. Assuming the rule to be as stated in the decision above cited, it is not applicable to the pleading and facts of this case.

WHITE vs. CHICAGO G. W. R. CO., 246 Federal 427, 158 C. C. A. 491—

The rule above stated that where the complaint specifically sets out the acts of negligence, the doctrine of *res ipsa loquitur* does not apply, is laid down in this case. We call attention, however, to the extremely full and specific allegations of the complaint set forth at page 430 of the report.

FRANCEY vs. RUTHLAND RY. CO. (N. Y.), 119 N. E. 86—

The proof in this case showed that the accident might be due either to the defendant's negligence or that of the plaintiff.

The statement made in counsel's brief is from the syllabus of the case and is not contrary to any contention which we make. The court adopted as the rule the following language quoted from another New York case:

> "When the thing causing the injury is shown to be under the control of a defendant, and the accident is such as, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the defendant afford sufficient evidence that the accident arose from want of care on its part." (See page 87.)

That is the rule which we contend for in this case.

McGOWAN vs. NELSON, 92 P. 40—

The rule stated from this case is correct and sustains the position of Defendant in Error.

FITZGERALD vs. GOLDSTEIN, 107 N. Y. S. 614—

There is nothing in this case conflicting with the position of Defendant in Error.

LONE STAR BREWING CO. vs. WILLIE, 114 S. W. 186—

The language quoted from this case in brief of Plaintiffs in Error is a comment in a case where the evidence showed no negligence of the defendant and none which could reasonably be presumed from the facts as shown by the evidence. It was a case in which the instrumentality was in control of the plaintiff in the case.

ROBINSON vs. CONSOLIDATED GAS CO. of NEW YORK, 86 N. E. 805—

The rule as stated from this case is sound and relied upon by Defendant in Error. The case was one of the fall of a scaffold, subjected to an excessive strain with lateral pressure to which it was not adapted. The court recognizing it to be the rule that if the scafforld fell while being subjected to ordinary use and with-

out any explanation, *res ipsa loquitur* would apply, held it inapplicable in the face of the extraordinary and unusual use.

FEINGOLD vs. OCEAN S. S. CO. OF SAVANNAH, GA., 113 N. Y. S. 1018—

This was a case of an employe injured by the breaking of a rope, used in hoisting lumber. *res ipsa loquitur* was not applied because it was not shown:

(1) That the weight was ordinary or proper, or indeed what weight was placed upon the rope.

(2) The size of the rope.

(3) That the rope was being used in the ordinary way.

KENNEDY vs. HAWKINS, 102 P. 733—

This was a suit by a tenant of a building for the falling of a wall of the building, the suit being against the contractors who were removing the underpinning under a contract with the owner. The complaint alleged negligence in failing to properly brace. No evidence was introduced to support the allegation. The evidence indicated that the accident happened by reason of the act of the owner in removal of too much supporting earth for which the defendants were not responsible.

TEXAS & P. COAL CO. vs. KOWSIKOWSIKI, 125 S. W. 3—

The rule stated as the doctrine of this case is sound and supports the position of the Defendant in Error.

LUCID vs. E. I. DuPONT De NEMOURS POWDER CO., 199 F. 377, 188 C. C. A. 61—

This is another case decided by this court. The case was decided on demurrer, the lower court sustaining the demurrer and the case being reversed by this court on the ground that the allegation which charged the defendants with negligently storing powder was sufficient and that the doctrine of *res ipsa loquitur* applied to the case.

DAVIS vs. CRISHAM, 99 N. E. 959—

This was the case of an injury to a mail carrier on the breaking of the fastenings of a wagon seat. The negligence alleged was unsafe fastenings, no claim being made of negligent driving. The evidence showed it to be probable that the horse suddenly started, throwing plaintiff backward and putting an unusual strain on the fastenings. We fail to see the application of this case to the situation in the case at bar.

HARDIE vs. CHARLES P. BOLAND CO., 98 N. E. 661—

The statement quoted from this case is not contrary to any position taken by Defendant in Error in this case. It was a case where a chimney collapsed, injuring a workman who was engaged as a mason in its construction. The evidence showed that the collapse was caused by the faulty plan of the architect and not by the negligence of the defendant contractor.

CANODE vs. SEWELL, 182 S. W. 421—

The statement from this case is not objectionable to our position.

HUFF vs. AUSTIN (OHIO), 21 N. E. 864—

In this case the court holds that boiler explosions are not infreqquent, even where there is no want of care.

GARRETT vs. SOUTHERN RY. CO., 101 Federal 102—

In this case Judge Taft holds that it is not judicially known by the court that preventative of spark emission by locomotives has reached that state of perfection, that it is improbable that sparks would be emitted if due care was used in construction of the boiler.

III.

PLAINTIFF IN ERROR BOUND TO FURNISH SAFE SEAT.

Having reviewed the authorities cited in the brief for Plaintiffs in Error, we will now proceed to a discussion of the case upon the law and facts as we understand them. It is to be noted in the cases cited in the brief of Plaintiffs in Error that they are largely cases where there was no relation of contract between the parties. Defendant in Error in this case paid admission to the show given by Plaintiffs in Error and had a right to rely upon the safety of the seats upon which she was directed to sit, or upon which she was directed to walk. The cases have not all stated the rule of liability of such a show proprietor in the same way. Many authorities state the rule to be that under such circumstances there is an implied warranty of the safety of the appliance. In other cases it is stated that the implied warranty is that due care has been used by the proprietor in providing safe appliances. Other cases state the rule to be that there is an implied warranty as to safety except as against de-

fects which are latent and undiscoverable by the exercise of due care.

> "The owner of a place of entertainment is charged with an affirmative positive obligation to know that the premises are safe for the public use, and to furnish adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance and he impliedly warrants the premises to be reasonably safe for the purpose for which they are designed."

38 Cyc. p. 268.

> "The owner of a place of entertainment is charged with an affirmative positive obligation to know that the premises are safe for the public use. He may not be exonerated merely because he had no precise knowledge of the defective condition of the place to which he has invited the public. When they accept his invitation and pay the prescribed admission fee, they have a right to assume he has furnished a safe place for them to witness the performance. If he leases the premises knowing the public use is to continue, he must at least be reasonably assured that they have not deteriorated, that they are still safe for occupancy by the public. This obligation requires affirmative action on his part; and, in order that he may be exculpated to one injured by reason of the decay of the place he vouched for, it must appear that he inspected the property or in some other adequate manner fulfilled his obligation to the public before leasing the same."

Lusk vs. Peck, 116 N. Y. Sup. 1051-4.

"When Brittain paid his admission fee and entered upon the seats in question, it was a matter of no importance to him who had erected the seats. Whether the representatives or managers of the fair, or Smith & Lucas, furnished the seats, he had a right to expect that he would be provided with reasonably safe seats."

Texas State Fair vs. Brittain, 118 Fed. Rep. 713-715.

"The fact that the amusement was furnished by a third party under an independent contract with the appellants in no manner relieved them from the duty to see that the appliances were reasonably safe for the use intended."

Wodnik vs. Luna Park Amusement Co., 42 L. R. A. (N. S.) 1070-1073 (Wash.).

"The managers of the grounds and stands occupied upon the occasion in question the position of proprietors of a public resort. Plaintiff was not a mere licensee, and did not occupy the stand by mere invitation. Whether responsibility to the plaintiff is grounded, in the form of action instituted, upon a contract, or upon a duty, it exists, if at all, because of an implied contract. The implied contract was that the stand was reasonably fit and proper for the use to which it was put. The duty was to see to it that it was in a fit and proper condition for such use. Neither plaintiff nor the public generally would be expected to examine the stand

and judge of its safety. This consideration, and the probable consequences of failure of the structure, imposed upon the responsible and profiting persons the duty of exercising a high degree of care to prevent disaster. They were not insurers of safety. They did not contract that there were no unknown defects not discoverable by the use of reasonable means, but, having constructed the stand, they did contract that, except for such defects, it was safe."

Scott vs. University of Michigan Athletic Ass'n, 17 L. R. A. (N. S.) 234-236 (Mich.).

"In my opinion, the defendant, having built the structure for the amusement or entertainment of the public, impliedly warranted that it might be used with such safety to the person as could reasonably be demanded."

Barrett vs. Lake Ontario Beach Improvement Co., 61 L. R. A. 829, 831 (N. Y.).

"A man who causes a building to be erected for viewing a public exhibition, and admits persons on payment of money to a seat in the building, impliedly undertakes that due care has been exercised in the erection, and that the building is reasonably fit for the purpose; and it is immaterial whether the money is to be appropriated to his own use or not." * * *

"There is a principle which I hold to be well established by all the authorities that one who lets for hire or engages for the supply of any article or thing, whether it be a carriage to be ridden in, or a bridge to be passed over, or a

stand from which to view a steeple chase, or a place to be sat in by anybody who is to witness a spectacle, for a pecuniary consideration, does warrant and does impliedly contract that the article or thing is reasonably fit for the purpose to which it is to be applied." * * *

"I do not at all pretend to say whether the relation of the parties raised a contract or a duty. It seems to me exactly the same thing; but I am of opinion that when a man has erected a stand of this kind for profit, that he contracts impliedly with each individual who enters there, and pays money to him for the entrance to it, that it is reasonably fit and proper for the purpose; or, if you choose to put it in another form, that it is the duty of the person who so holds out the building of this sort to have it in a fit and proper state for the safe reception of the persons who are admitted."

Francis vs. Cockrell, L. R. 5, Q. B. 184.
See also:

Thompson vs. Lowell, 40 L. R. A. 345 (Mass.).

Fox vs. Buffalo Park, 47 N. Y. Sup. 788.

IV.

DOCTRINE OF RES IPSA LOQUITUR APPLIES

"The doctrine *res ipsa loquitur* asserts that whenever a thing which produced an injury is shown to have been under the control and

management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care."

20 R. C. L. Par. 156, p. 187.

"It is generally held that the mere fact that an injury has occurred on the premises of defendant creates no presumption of negligence on his part, in the absence of evidence of some defect. Where, however, defendant owed to the injured person the duty of making the premises safe, the doctrine *res ipsa loquitur* applies."

29 Cyc. p. 594.

The rule has been applied and the accident and circumstances under which it occurred held sufficient to go to the jury as sufficient to sustain a verdict of negligence in a great variety of cases, including accidents happening through failures in appliances in places of public resort or amusement.

In the case in the State of Washington, from which we have quoted above, the plaintiff paid admission to Luna Park, a place of public amusement in which there was maintained a mechanical device

called a striking machine, so arranged that the patrons could with a heavy mallet strike and cause the force of the blow to be registered. The plaintiff used a mallet, the head of which flew off as the blow was being struck, injuring the plaintiff. The defendant, owner of Luna Park, defended on the ground that the striking machine was operated by an independent contractor, but the court held as above quoted that this was no defense, as the Luna Park proprietors having received a part of the proceeds of the admission fee, were liable upon an implied warranty of the safety of the appliances offered the public therein. It was further contended by the defendant that there was not sufficient evidence of negligence, to which contention the court said:

> "We think that the fact that the head of the mallet flew off while the mallet was being used by the respondent for the very purpose for which it was furnished to him, was sufficient to cast the burden of explanation upon the appellants. No explanation being offered, the jury was warranted in inferring that the head of the mallet came off because it was negligently and insecurely fastened to the handle.
>
> "'When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the

ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.' 1 Shearm. & Ref. Neg. 5th ed. par. 59.

"The doctrine of *res ipsa loquitur* means that the jury, from their experience and observation as men, are warranted in finding that an accident of this kind does not ordinarily happen, except in consequence of negligence. As was said in *Griffin vs. Boston & A. R. Co.*, 148 Mass. 143, 1 L. R. A. 698, 12 Am. St. Rep. 526, 19 N. E. 166; 'All that the plaintiff upon this branch of his case was required to do was to make it appear to be more probable that the injury came, in whole or in part, from the defendant's negligence than from any other cause.' *Graaf vs. Vulcan Iron Works*, 59 Wash. 325, 328, 109 Pac. 1016, 1017.

"There was no duty of inspection resting upon the respondent. There was no evidence of any defect so patent that he ought to have observed it without inspection. He had the right to assume that the mallet was fit for the purpose for which it was furnished him. He cannot be held to have assumed the risk of injury from any defects not so patent as to have been apparent to the casual observer. This court is committed to the rule that the doctrine *res ipsa loquitur*, under conditions where there is no duty of inspection upon the servant, is applicable even as between master and servant. *La Bee vs. Sultan Logging Co.*, 47 Wash. 57, 20 L. R. A. (N. S.) 405, 91 Pac. 560; *La Bee vs. Sultan Logging Co.*, 51 Wash. 81, 20 L. R. A. (N. S.) 408, 97 Pac. 1104; *Graaf vs. Vulcan*

Iron Works, 59 Wash. 325, 109 Pac. 1016; *Cleary vs. General Contracting Co.,* 53 Wash. 254, 101 Pac. 888.

"'*A fortiori* is the doctrine applicable in a case of this kind where a customer or patron is present by invitation, and is injured by an instrumentality under the exclusive control of the defendant or his agents. *Anderson vs. McCarthy Dry Goods Co.,* 49 Wash. 398, 16 L. R. A. (N. S.) 931, 126 Am. St. Rep. 870, 95 Pac. 325. And for a still stronger reason should the doctrine be invoked where, as here, the instrumentality which caused the injury was handed to the patron for use in the very purpose for which he was invited. In the very nature of the case, the respondent could not be expected to prove the specific defect in the mallet which caused the head to separate from the handle. That could only have been determined by inspection. The duty of inspection was upon the appellants. They offered no evidence of such inspection. The jury was warranted in finding them negligent."

Wodnik vs. Luna Park Amusement Co., 42 L. R. A. (N. S.) 1070, 1074, 1076 (Wash.).

"The law is well settled in this state that, where a party in possession of premises throws the same open to the public for the purpose of gain, he impliedly warrants the premises to be reasonably safe for the purposes for which they were designed; and where, as in the case at bar, the plaintiff is injured by the fall of a structure which she is using at the invitation of the person in charge, and in the manner which such person had a right to expect the same

would be used, the burden of explaining the cause of the accident and of showing freedom from negligence is upon the defendant. The plaintiff was upon this platform for the purpose of eating a meal. She was there because the defendant impliedly stated to her that the place was safe for that purpose and it was the duty of the defendant to have the premises in a reasonably safe condition. The platform fell, the plaintiff was injured and the defendant having failed to show a condition of facts establishing a reasonable degree of care to make the premises what he had held them out to be, he was properly chargeable with liability for the injuries sustained."

Schnizer vs. Phillips, 95 N. Y. Sup. 478.

Where a fire extinguisher was kept on the sill of an open window at the side of the stairway leading to the gallery of a theatre, unsecured, and it was knocked down by the passing patrons of the theatre, injuring one of them, the court said:

"The accident itself might be regarded, in the absence of explanation, as proof of the negligence charged."

Stair vs. Kane, 156 Fed. Rep. 100, 101.

The burden is on defendant to show due care where a grandstand collapses and the invitee who has paid admission is injured.

Fox vs. Buffalo Park, 47 N. Y. Sup. 788.

The doctrine of *res ipsa loquitur* was applied in the following (and many other) cases:

Case of a cable furnished to the plaintiff for a particular purpose, breaking while being used in a proper manner for that purpose.

La Bee vs. Sultan Logging Co., 20 L. R. A. (N. S.) 405 (Wash.).

Case of a fall of a scaffold furnished by the master for a servant to work on while being properly used by the servant.

Cleary vs. General Contracting Co., 53 Wash. 254.

Fall of a window guard from a window.

Mentz vs. Schieren, 74 N. Y. Sup. 889.

Fall of an elevator put to accustomed use.

Kennedy vs. McAllister, 52 N. Y. S. 714;

National Biscuit Co. vs. Wilson, 78 N. E. Rep. 251 (Ind.);

Stewart vs. Van Deventer Carpet Co., 50 S. E. Rep. 562 (N. C.);

Edwards vs. Manufacturers Building Co., 61 At. Rep. 646 (R. I.).

Fall of a wall under construction.

Scharff vs. Southern Ill. Construction Co., 92 S. W. Rep. 126 (Mo.).

Fall of a tool from a building under construction.

Melvin vs. Penn. Steel Co., 62 N. E. Rep. 379 (Mass.);

Ambright vs. Zion, et al, 79 N. W. Rep. 72 (Ia).

Steam railway used on street ran over fence and garden and against house.

Harlow vs. Standard Improvement Co., 78 Pac. Rep. 1045 (Cal.).

Fall of rock bins on scow underneath.

Hastorf vs. Hudson River Stone Supply Co., 110 Fed. Rep. 669.

Sudden starting of machine after power switched off by operator, injuring operator.

Ross vs. Double Shoals Cotton Mills, 52 S. E. 121.

Horse stepping on electric railway track killed by electric current.

Clarke vs. Nassau Electric Ry. Co., 41 N. Y. Sup. 78;

Wood vs. Wilmington City Ry. Co., 64 At. 246.

Car with power on, running on car track with no one in charge.

Chicago City Ry. Co. vs. Eick, 111 Ill. App. 452.

Fall of a keg on stevedore from hatchway.

Jensen vs. Thomas, 81 Fed. Rep. 578.

Fire destroying lumber, caused by train collision, the collision being held prima facie proof of negligence.

Cinn. Ry. Co. vs. South Fork Coal Co., 139 Fed. Rep. 528, (Circuit Court of Appeals, 6th Circuit).

Ice falling on child from ice wagon.

Cook vs. Piper, 79 Ill. App. p. 291.

Fall of a door.

Klitzke vs. Webb, 97 N. W. 901.

Fall of an open window.

Carrol vs. Chicago B. & N. Ry. Co., 75 N. W. 176.

Collapse of a building.

Patterson vs. Jos. Schlitz Brewing Co., 91 N. W. 336.

Lubelsky vs. Silverman, 96 N. Y. Sup. 1056.

V.

RES IPSA LOQUITUR NOT EXCLUDED BY ALLEGATIONS OF COMPLAINT

It is contended in the brief of Plaintiff in Error that the rule of *res ipsa loquitur* does not apply in this case upon the ground that Defendants Error in their complaint specifically allege the negligence of the defendant relied upon. The principal case cited by Plaintiffs in Error to support their contention is the case of The Great Northern, 251 Fed. Rep. 827, decided by this court. We have already reviewed this case elsewhere in this brief and as a matter of fact, without regard to the rule contended for and suggested by the court, the case was one in which it would have been impossible in any event to have applied the doctrine, irrespective of the question of pleading.

The courts of the country are not in unison upon this point. Three different rules have been laid down, the courts of some states holding with each view.

By some courts the broad rule is laid down that the rule of *res ipsa loquitur* applies even though negligence is alleged specifically and in detail. In others the rule is in such cases held to obtain in so far as it applies in support of the specific negligence alleged, but not to obtain in such a way as to sustain the plaintiff's cause of action upon a different act of negligence than that alleged.

Where the rule contended for is supported it is really based upon the principle of pleading which does not permit a plaintiff to allege that a defendant committed certain acts of negligence and then when the trial is had and defendant is prepared to meet that issue seek to charge him upon a different act of negligence and support that charge with the presumptions involved in the doctrine of *res ipsa loquitur*. See for a full discussion of these three lines of authority, the notes found at 24 L. R. A. (N. S.) 788, and L. R. A. 1915 F. 992.

By an examination of the cases in which the rule contended for by Plaintiff in Error has been followed, it will be found that they are all cases in which the complaint fully and specifically sets forth certain definite acts of negligence and in which the doctrine of *res ipsa loquitur* was not applicable in the nature of

the case. The presumption of negligence which obtains under the doctrine of *res ipsa loquitur* is that because it is not usual for an instrumentality furnished and put to its usual use to break, and because naturally therefore when it does break it is under the doctrine of probabilities more likely that there was some negligence on the part of the party whose duty it was to keep the instrumentality in order, and who had charge of its operation and directed its use, than that it happened without the intervention of such negligence. But the presumption arising under the doctrine of *res ipsa loquitur* is not that some specific act of negligence caused the break and injury, and if the plaintiff in preparing his complaint singles out some particular act or series of acts and charges that the break occurred by reason of acts of negligence of the defendant as to one or more of those particulars and there are other acts of negligence which might as well have caused the injury as the acts alleged, the presumption fails, it being just as likely that some act of negligence other than that specifically alleged caused the injury. The presumption covering all the acts of negligence which might have caused the accident and the plaintff by the allegations of his complaint

having excluded a portion of the acts which would otherwise have been covered by the presumption, there is in such cases some basis for the doctrine contended for by Plaintiff in Error.

But the doctrine is wholly inapplicable to the situation in the case at bar. Plaintiff did not in fact allege any specific act of negligence. The law put upon the Plaintiff in Error the duty of furnishing the Defendant in Error with a safe seat. The complaint goes no further than to charge the defendant with a negligent failure to perform that duty. The allegation of the complaint upon the subject of negligence is,

> "The said accident was caused solely by the negligence of the defendants in placing in the said row or bank of seats the said defective and weak seat and in directing the said plaintiff, Etta Eichelbarger as aforesaid, to seek a seat in the said row or bank and for that purpose to step upon the said seats." (Transcript of Record, p. 3.)

These two acts alleged, that of placing the weak seat where it was to be used by patrons and directing the Defendant in Error to step upon it, were ultimate facts necessary to be alleged in any statement which could be made of the cause of action stated in the complaint, and the negligence is al-

leged by describing them as having been negligently done. To hold that by stating these ultimate facts as to the accident, and which Defendant in Error was compelled to state in any statement of her cause of action, she has therefore precluded herself from the right to rely upon the natural and usual presumptions of fact following from the description of the accident and the circumstances surrounding it, would be to prevent her in any manner availing herself of the presumption of *res ipsa loquitur*, no matter how her pleading might be drawn. It is not alleged how the seats were made weak or defective, in what respect they were so weak or defective, whether it arose from negligence in original construction; in erection when placed together for the purpose of giving the circus at this particular town or from ordinary wear and tear, or from some accident or design or act of a third party, coupled with the failure of the defendant to properly inspect. Any or all of these elements of negligence might have existed. Defendant in Error does not know. The proof was all in the hands of the defendant. But the Plaintiffs in Error did upon Defendant in Error's paying admission and entering the show, direct her to the weak seat and it broke under her

weight, and she having alleged and proven that fact, the presumption of *res ipsa loquitur* follows as a matter of law.

A comparison of the allegations of the complaint in this case with that of every case cited by Plaintiffs in Error to support the contention that the doctrine does not apply in this case, would show radical difference in the pleading in this case and that in the cases cited.

However, we respectfully submit that even had the negligent act of Plaintiffs in Error been specifically alleged in the complaint, the rule contended for should not obtain in this case. It is settled by the decisions of the Supreme Court of the State of Washington, that so far as the State of Washington is concerned, the doctrine of *res ipsa loquitur* is applicable even though the acts of negligence are alleged specifically and in detail.

> *Walters vs. Seattle R. & S. R. Co.*, 24 L. R. A. (N. S.) 789 (Wash.);
>
> *Woduik vs. Luna Park*, 42 L. R. A. (N. S.) 1070 (Wash.);
>
> *La Bee vs. Sultan Logging Co.*, 20 L. R. A. (N. S.) 405.

If the doctrine contended for by Plaintiffs in

Error as to the applicability of *res ipsa loquitur* in this case applies, it would be by virtue, as it seems to us, of a rule as to pleading, the foundation of the rule being that because of certain pleading certain rules of evidence would not obtain in the case. However, as we understand the law, the rules of practice and pleading which are settled in this state for a personal injury case, following our Code provisions as to pleading, are controlling upon a Federal Court in such a case.

U. S. Revised Statutes, Sec. 721-914.

Parker vs. Moore, 111 Fed. Rep. 470.

This case was reversed by the Circuit Court of Appeals of the Fourth Circuit, but not upon the point to which the case is cited.

Parker vs. Moore, 115 Fed. Rep. 799;
Ex Parte Fisk, 113 U. S. 713;
Glenn vs. Sumner, 132 U. S. 152, 156;
Stewart vs. Morris, 89 Fed. Rep. 290, Circuit Court of Appeals, Seventh Circuit.

U. S. vs. Atlantic Coast Line R. Co., 153 Fed. Rep. 918;

U. S. vs. Parker, 120 U. S. 89.

It is provided by statute in the State of Washington that the complaint shall contain,

"A plain and concise statement of facts constituting the cause of action without unnecessary repetition." Rem. 1915 Code, Sec. 258.

And it is further provided that,

"Its allegations shall be liberally construed with a view to substantial justice between the parties." Rem. 1915 Code, Sec. 285. It is further provided that,

"The court shall in every stage of an action disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party and no judgment shall be reversed or affected by reason of such error or defect." Rem. 1915 Code, Sec. 307.

It is further provided that,

"No variance between allegation in pleadings and proof shall be deemed material unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Rem. 1915 Code, Sec. 299.

We submit that the decision of our Supreme Court as to the effect of specifically pleading negligent acts upon the evidence required to be introduced is a construction of the pleading under the Statutory provisions of the State regarding pleading and that the rule is, under the Federal Statute, that

the Federal Courts should adopt the local rule as to the construction and application of such statutes.

But there really is no necessity of discussing the question of which rule as to *res ipsa loquitur* should be applied. The complaint in fact does not allege any specific negligence and *res ipsa loquitur* applies under the rules of all the courts. In passing, it is interesting to note that in the brief of Plaintiffs in Error it is contended on pages 15 and 16, first that there is no allegation of negligence sufficient to state a cause of action, and second, that the allegations are so full and specific as to leave no room for presumptions. We have seen a circus rider ride two horses, but never two horses traveling in opposite directions.

VI.

NOTHING IN CASE TO SHOW LATENT DEFECT

In the brief of Plaintiffs in Error it is contended that the evidence of Fred Eichelbarger, a witness for Defendant in Error, showed that he saw nothing to indicate any defect in the board and that this testimony showed that the break was caused by a latent defect. That, however, is the usual situation with persons who are injured by the breaking of appliances which they use in such a place of entertainment. They would not step on a board which to their casual observation as they walked along seeking for a seat, indicated that it was unsafe. Eichelbarger said he did not examine it. Such a casual observation is not such an inspection as is required for the protection of the public on the part of the owner of a Circus. It is extremely probable that even an inspection by the witness Fred Eichelbarger in order to determine safety would not be a sufficient inspection. There was nothing in his testimony to indicate competency to pass upon such a question even had he given the seat the inspection which the duty of the proprietor

required. The jury, as a matter of fact, have found by their verdict that there was negligence and the question of the credibility of the witness was solely for them to determine. Had Plaintiffs in Error used due care, either by proper inspection or in any other way, or had the defect been latent or undiscoverable, it was within the power of the Plaintiffs in Error to prove those facts and the burden under the authorities which we have cited was clearly upon the Plaintiffs in Error. Not having produced any such evidence, it is to be assumed that it could not be produced.

We most respectfully submit that the judgment of the trial court should be affirmed.

CHAS. H. HARTGE, and
& TURNER,

PRESTON, THORGRIMSON &
Attorneys for Defendants in Error.

No. 3523

United States

Circuit Court of Appeals

For the Ninth Circuit.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

EVELYN E. MASON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Index.

Names and Addresses of Attorneys of Record.

GEORGE A. JUDSON, Esq., and H. R. EICKEMEYER, Esq., of Great Falls, Montana,
For Plaintiff and Defendant in Error.

Messrs. WALSH, NOLAN & SCALLON, of Helena, Montana, and FLETCHER MADDOX, Esq., of Great Falls, Montana,
For Defendant and Plaintiff in Error.
[1*]

In the District Court of the United States in and for the District of Montana.

No. 783.

EVELYN E. MASON,
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Defendant.

BE IT REMEMBERED, that on September 26th, 1919, Transcript on Removal of the said cause from the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade, was duly filed herein, the plaintiff's complaint contained in said transcript on removal, being in the words and figures following, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains of the defendant, and for cause of action respectfully shows to the Court and alleges:

1st.

That the defendant is now and at all times hereinafter mentioned was a corporation, organized and existing under and by virtue of the laws of the State of New York and licensed and empowered to transact business in its special line in the State of Montana.

2d.

That on or about the 14th day of December, A. D. ~~1918~~ 1917, in consideration of the premium of Two Hundred Twenty-two and 50/100 Dollars ($222.50), payable annually for twenty years from the date of the policy hereinafter set forth, the defendant, by its agents, duly authorized thereto, executed its policy of insurance in writing to one George Mason, on his

12/22/19
H. H. W.

life, in the sum of Five Thousand Dollars, a copy of which is hereto annexed marked Exhibit "A" and made a part of this complaint.

3d.

That on or about the 6th day of May, A. D. 1919, at Great Falls, Montana, the said George Mason died, but his death [3] did not result from self-destruction or as a result directly or indirectly of a state of warfare or insurrection outside the boundaries of continental United States or elsewhere; that the said insured did not, during the term of this policy, travel or reside outside the continental United States or the Dominion of Canada.

4th.

That this plaintiff, Evelyn E. Mason, was the wife of the said George Mason at the time said policy herein mentioned was issued to him, and so remained at the time of his death.

5th.

That on or before the 14th day of December, A. D. 1918, the said George Mason, now deceased, paid to this defendant, the New York Life Insurance Company, a corporation, the sum of Two Hundred Twenty-two and 50/100 Dollars ($222.50), being the payment in advance, constituting the second premium under said policy, and which said premium would maintain said policy in full force and effect to December 14, 1919.

6th.

That said Evelyn E. Mason duly fulfilled all of the agreements and conditions of said policy of insurance on her part to be done and performed as bene-

ficiary thereunder, and that this plaintiff, to wit, on or about the 12th day of May, A. D. 1919, made and delivered to the defendant, New York Life Insurance Company, due notice and proof of the death of said George Mason, in accordance with the requirements of said policy.

7th.

That at many times prior to the commencement of this [4] action, the plaintiff demanded of the defendant the payment of said sum of Five Thousand Dollars; that no part of the said sum of Five Thousand Dollars has been paid, and the whole thereof is now due thereon from the defendant to the plaintiff, as such beneficiary under said policy, together with interest thereon from the defendant to the plaintiff at the rate of eight per cent per annum from date such notice of proof was filed with the defendant, as aforesaid.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Five Thousand Dollars, as provided for in said policy, together with interest thereon at the rate of eight per cent per annum from the 12th day of May, A. D. 1919, together with her costs and disbursements herein.

GEORGE A. JUDSON,
Attorney for Plaintiff. [5]

State of Montana,
County of Cascade,—ss.

Evelyn E. Mason, being first duly sworn upon oath, deposes and says: That she is the plaintiff named in the foregoing action; that she has read the foregoing complaint and knows the contents thereof

and that the matters and things therein stated are true of her own knowledge.

EVELYN E. MASON.

Subscribed and sworn to before me this 5th day of Aug., 1919.

[Seal] GEORGE A. JUDSON,
Notary Public for the State of Montana, Residing at Great Falls, Montana.

My commission expires April 1, 1920. [6]

Exhibit "A."

NEW YORK LIFE INSURANCE CO.

AGREES TO PAY

to Evelyn E., wife of the insured * * * Beneficiary, (with the right on the part of the insured to change the Beneficiary in the manner provided in Section 6). Beneficia

* * * FIVE THOUSAND * * * Dollars, Face Amo
(the face of this Policy)

upon receipt of due proof of the death of * * * GEORGE MASON * * * the insured; Insured

DOUBLE THE FACE OF THIS POLICY. or Double Indemnity

UPON RECEIPT of due proof that the death of the insured was caused directly by accident while traveling as a passenger on a street car, railway train, steamship licensed for regular transportation of passengers, or other public conveyance operated by a common carrier, and that such death occurred within sixty days after such accident; and

TO PAY TO THE INSURED
ONE-TENTH OF THE FACE OF THIS POLICY

ermanent isability. Per annum during the lifetime of the Insured, if the Insured becomes wholly and permanently disabled before age 60, subject to all the terms and conditions contained in Section 1 hereof.

THIS POLICY CONTAINS THE FOLLOWING BENEFITS AND PROVISIONS:

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emium. This contract is made in consideration of the payment in advance of the sum of $222.50, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this policy to the 14th day of December, Nineteen Hundred and Eighteen, and of a like sum on said date and every Twelve Calendar months thereafter during the [7] life of the Insured, until premiums for Twenty full years in all shall have been paid from the date on which the policy takes effect.

This Policy takes effect as of the 14th day of December, Nineteen Hundred and Seventeen, which day is the anniversary of the Policy. If the Insured becomes wholly and permanently disabled before age 60, the payment of premiums will be waived under the terms and conditions contained in Section 1.

Insurance payable at death. Premiums payable for 20 years. Total and Permanent Disability Benefits. Double Indemnity for fatal travel accident. Annual Participation in Surplus. I. P. D. & D. 917–2. Age 40

SECTION 1. TOTAL AND PERMANENT DISABILITY BENEFITS.

Whenever the Company receives due proof, before default in the payment of premium, that the Insured, before the anniversary of the Policy on which the Insured's age at nearest birthday is 60 years and subsequent to the delivery hereof, has become wholly disabled by bodily injury or disease so that he is and will be presumably, thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and that such disability has then existed for not less than sixty days—the permanent loss of the sight of both eyes, or the severance of both hands or of both feet, or of one entire hand and one entire foot, to be considered a total and permanent disability without prejudice to other causes of disability—then

1. WAIVER OF PREMIUM. — Commencing with the anniversary of the Policy next succeeding the receipt of such proof, the Company will on each anniversary waive payment of the premium for the ensuing insurance year, and, in any settlement of the policy, the Company will not deduct the premiums so waived. The loan and surrender values provided for under Sections 3 and 4 shall be calculated on the basis employed in said sections, the same as if the waived premiums had been paid as they became due.

2. LIFE INCOME TO INSURED.—One year after the anniversary of the Policy next succeeding the receipt of such proof, the Company will pay the Insured a sum equal to one-tenth of the face of the Policy and a like sum on each anniversary thereafter during the lifetime and continued disability of the Insured. Such income payments shall not reduce the sum payable in any settlement of the Policy. The Policy must be returned to the Company for indorsement thereon of each income payment. If there be any indebtedness on the Policy, the interest thereon may be deducted from each income payment.

3. RECOVERY FROM DISABILITY.—The Company at any time and from time to time, but not oftener than once a year, demand due proof of such continued disability, and upon failure to furnish such proof, or if it appears that the Insured is no longer wholly disabled as aforesaid, no further premiums shall be waived nor income payments made. [8] The annual premium for the Total and Permanent Disability Benefits is $7.90, and is included in the premium stated on the first page of this Policy. Any premium due on or after the anniversary of the Policy on which the age of the Insured at nearest birthday is 60, shall be reduced by the amount of premium charged for the Disability Benefits.

SECTION 2. PARTICIPATION IN SURPLUS —DIVIDENDS.

The proportion of divisible surplus accruing upon this Policy shall be ascertained annually. Beginning at the end of the second Insurance year, and

on each anniversary thereafter, such surpluses shall have been apportioned by the Company to this Policy shall at the option of the insured be either (a) Paid in cash; or (b) Applied toward payment of premiums; or (c) Applied to purchase a Participating Paid-up Addition to the sum insured; or (d) Left to accumulate at such rate of interest as the Company may declare on funds so held, but at a rate never less than three per cent compounded and credited annually, and withdrawable in cash on any anniversary, or payable at the maturity of the Policy to the person entitled to its proceeds.

If the Insured fails to notify the Company in writing, within three months after the Company shall have mailed to him a written notice of the amount of said dividend and the options available as aforesaid, which option he selects, the Company will apply said dividend to the purchase of a paid-up addition to the sum insured. Such paid-up addition may be surrendered for cash at any time not later than three months after any default in the payment of premium, and the cash value thereof shall never be less than the original cash dividend.

Dividends may be applied to Reduce the Number of Premiums, or make Policy Mature as an Endowment. Whenever the cash value of this Policy, including the cash value of any dividend additions under Option (c) plus any sums held under Option (d), equals or exceeds the net single premium calculated on the same basis as the premium on this Policy for a Policy giving the same rights, privileges, and benefits, at the then attained age of the Insured, the

Company, on any anniversary of the Policy thereafter, upon the Insured's written request, will endorse the Policy as a fully paid-up, participating Policy, and will pay in cash the excess, if any, of such cash value over said single premium, and thereafter no further payment of premiums will be required; or whenever said cash value shall equal or exceed the face amount of this Policy, the Company, upon due surrender of the Policy and all claims thereunder, will pay in cash the face amount of the Policy and any excess of said cash value, less any indebtedness to the Company. [9]

SECTION 3. LOAN VALUES.

After three full years' premiums have been paid and before default in the payment of premium, the Company will advance to the Insured on the sole security of this Policy as duly evidenced in writing any sum desired,—provided the total indebtedness to the Company, including any advance then made, shall never exceed that sum which with six per cent interest to the end of the then current insurance year shall equal the Cash Surrender Value. Interest on the Loan shall be at the rate of six per cent per annum payable annually on the anniversary of the Policy. If interest is not paid when due, it shall be added to the principal. All or any part of the indebtedness may be repaid at any time before the Company has deducted it from the value of the Policy. Failure to repay such indebtedness or to pay interest shall not avoid the Policy, but whenever the amount of the total indebtedness equals the Cash Surrender Value, the Policy shall become void one month after the

Company shall have mailed notice to the last known address of the insured and of the assignee of record, if any.

TABLE OF MINIMUM LOAN VALUES FOR EACH $1,000 THE FACE AMOUNT

Yrs.	Prem. Paid.	Loan Value.	Yrs.	Prem. Paid.	Loan Value.
	3	$58		15	$433
	4	84		16	469
	5	113		17	507
	6	140		18	546
	7	170		19	586
	8	201		20	628
	9	233		21st year	639
	10	266		22d "	650
	11	298		23rd "	660
	12	330		24th "	671
	13	363		25th "	682
	14	398			

SECTION 4. SURRENDER VALUES.

After three full years' premiums have been paid, the Insured may, at the end of any insurance year or within three months after any default in payment of premium but not later, surrender the Policy, and

(1) Receive its Cash Surrender Value; or

(2) Receive the amount of non-participating paid-up insurance which the cash surrender value at date of default less any indebtedness hereon will purchase, payable at the same time and on the same conditions as this Policy, but without disability or double indemnity benefits. The Insured may at any time obtain a loan on such paid-up insurance, or surrender it for its cash surrender value; or

(3) If the Policy be not surrendered for cash or for paid-up insurance within three months after default in payment of premium, its cash surrender

value at date of default, less the amount of any indebtedness, shall automatically purchase Continued Insurance from the date of default for [10] the face of the Policy plus any dividend additions and less any indebtedness to the Company. The Continued Insurance shall be without future participation and without the right to loans, cash surrender values, disability or double indemnity benefits.

The Cash surrender value shall be the reserve on the face of the Policy at the end of the insurance year or, in event of default, at the date of default (omitting fractions of a dollar per thousand of insurance) and the reserve on any outstanding paid-up additions, plus any dividends standing to the credit of the Policy, and less a surrender charge for the third to the ninth years, inclusive, of not more than one and one-half per cent of the face of the Policy. Such reserve will be computed on the basis of the American Table of Mortality and interest at three per cent, and the amount of paid-up insurance under (2) and the term of the continued insurance under (3) will be computed on the same basis at the attained age of the Insured on the date of default.

The values in the table opposite are computed in accordance with the above provisions, assuming that premiums have been paid in full when due for the number of years stated, that there is no indebtedness to the Company, no outstanding paid-up additions, and no dividends standing to the credit of the Policy; the surrender charge, if any, has been deducted.

TABLE OF GUARANTEED SURRENDER VALUES.

After policy has been in force.	Cash surrender value for ea. $1,000 of the face amount.	Paid-up life ins. for ea. $1,000 of the face am't.	Face am't. of the policy cont'd for Yrs.	Days.
3	$62	$128	6	72
4	90	183	8	254
5	120	240	10	356
6	149	291	12	269
7	181	347	14	153
8	214	402	15	310
9	248	457	17	26
10	283	511	18	48
11	316	560	18	341
12	350	608	19	241
13	385	657	20	127
14	422	705	21	9
15	459	754	21	271
16	498	802	22	199
17	538	851	23	179
18	579	900	24	259
19	622	950	26	217
20	666	1000	—	——

[11]

21	678	
22	689	POLICY PAID-UP
23	700	PARTICIPATING.
24	712	
25 Years.	723	

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Values for later years will be computed on the same basis and will be furnished on request.

SECTION 5. TERM INSURANCE IN CASE OF LOAN.

Any loan under this Policy may be covered by term insurance as follows:

1. The Insured must furnish evidence of insurability satisfactory to the Company.

2. The premium shall be computed at the attained age of the Insured at the time the term insurance is made or renewed.

3. Term insurance shall not exceed beyond the next anniversary, but may under the same conditions be renewed from year to year. No term insurance shall be made or renewed after age sixty-five.

4. If the term insurance exceeds the indebtedness, the Company may cancel the excess and refund the unearned premium.

5. Term insurance takes effect upon delivery to the Insured of the Company's Policy therefor. The sum payable as term insurance shall be applied to the cancelation of the indebtedness.

PREMIUM FOR EACH $100 OF TERM INSURANCE.

Insured's attained age.	Premium for one yr.	Insured's attained age.	Premium for one yr.	Insured's attained age.	Premium for one yr.	Insured's attained age.	Premium for one yr.
15	$0.73	28	$0.79	41	$0.96	54	$1.67
16	0.74	29	0.80	42	0.99	55	1.79
17	0.74	30	0.81	43	1.01	56	1.91
18	0.74	31	0.82	44	1.04	57	2.05
19	0.75	32	0.83	45	1.07	58	2.21
20	0.75	33	0.84	46	1.11	59	2.38
21	0.76	34	0.85	47	1.15	60	2.57
22	0.76	35	0.86	48	1.20	61	2.78
23	0.77	36	0.87	49	1.26	62	3.01
24	0.77	37	0.89	50	1.33	63	3.26
25	0.78	38	0.90	51	1.40	64	3.55
26	0.78	39	0.92	52	1.48		
27	0.79	40	0.94	53	1.57		

For periods of less than one year, the premium shall be at the rate of one-tenth of the one year's premium for each month and fraction of a mo. [12]

SECTION 6. OTHER BENEFITS AND PROVISIONS.

Age.—If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Assignment.—Any assignment of this Policy must be made in duplicate and one copy filed with the Company at its Home Office. The Company assumes no responsibility for the validity of any assignment.

Change of Beneficiary.—The Insured may at any time, and from time to time, change the beneficiary, provided this Policy is not then assigned. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the Policy for indorsement of the change thereon by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change shall relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured be living at the time of such indorsement or not. In the event of the death of any beneficiary before the Insured the interest of such beneficiary shall vest in the Insured.

Grace.—If any premium is not paid on or before the day it falls due the policy-holder is in default; but a grace of one month (not less than thirty days) subject to an interest charge of five per cent per annum will be allowed for the payment of every premium after the first, during which time the insurance continues in force. If death occurs within

the period of grace the unpaid premium for the then current insurance year will be deducted from the amount payable hereunder.

Indebtedness.—Any indebtedness to the Company against the Policy shall be deducted in any settlement thereof.

Miscellaneous Provisions.—The Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in absence of fraud, be deemed representations and not warranties, and no such statement shall avoid the Policy or be used in defense to a claim under it, unless it be contained in the written application and a copy of the application and a copy is indorsed upon or attached to this Policy when used. The Insured may, without the consent of the beneficiary, receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy. No agent is authorized to waive forfeitures, or to make, modify or discharge contracts, or to extend the time for paying a premium. [13]

Optional Methods of Settlement.—If there is no assignment of this Policy, the Insured, or in case the Insured shall not have done so, the beneficiary after the Insured's death, may, by written notice to the Company at its Home Office, make the proceeds of this Policy payable under one of the options contained in Section 7, which section is indorsed hereon and made a part of this Policy.

Payment of Premiums.—All premiums are payable on or before their due date at the Home Office of

the Company or to an authorized agent of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt. The premium is always considered as payable annually in advance, but by agreement in writing and not otherwise may be made payable in semi-annual or quarterly payments. Any unpaid premiums required to complete payment for the current insurance year in which death occurs shall be deducted from the amount payable hereunder. The payment of the premium shall not maintain the Policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

Privilege of Change to Other Plans of Insurance. At any time before default in payment of premium, provided the Insured is then less than 55 years of age and that payment of premium has not been waived under Section 1 hereof, the Insured may, without medical re-examination, exchange this Policy for a Policy of the same amount, disability and double indemnity benefits, upon any plan of insurance having a higher rate of premium issued by the Company at the time this Policy takes effect, and containing the same privileges, benefits and conditions as would have been included in the Policy if it had been issued originally on the new plan. Such exchange shall be

effective upon surrender of this Policy and the payment of a sum equal to the difference between the premiums on the new Policy and the premiums on this Policy up to the date of exchange, with compound interest at the rate of six per cent per annum from the due date of each premium to the date when the exchange is made, provided that if the premium for disability benefits on the new policy is less than the premium for disability benefits on this Policy, the difference in premiums shall be on the basis of the premiums for the two Policies exclusive of the premiums for disability benefits; allowance will be made for any larger cash dividends on the new plan. The new Policy shall take effect as of the date of this Policy, and the Premium shall be based upon the same age as this Policy at the rate in force at the date of this Policy. [14]

Reinstatement.—At any time within five years after any default, upon written application by the Insured and presentation at the Home Office of evidence of insurability satisfactory to the Company, this Policy may be reinstated together with any indebtedness in accordance with the Loan provisions of the Policy, upon payment of loan interest, and of arrears of premiums with five per cent interest thereon from their due date.

Self-destruction.—In event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Com-

pany and no more. Except as provided by endorsement hereon.

THIS POLICY IS FREE OF CONDITIONS as to residence, travel, occupation, or military or naval service, and shall be incontestable after two years from its date of issue except for non-payment of premium. All benefits under this Policy are payable at the Home Office of the Company in the City and State of New York.

IN WITNESS WHEREOF the New York Life Insurance Company has caused this contract to be signed this Twenty-seventh day of December * * Nineteen Hundred and Seventeen.

DARWILL P. KINGSLEY,
President.

SEYMOUR M. BALLARD,
Secretary.

————————————,
Registrar.

Examined ————————.

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If the insured shall die within two years from the date of issue of this Policy as a result directly or indirectly of a state of warfare or insurrection outside the boundaries of Continental United States, this Policy shall be null and void and the Company shall not be liable for any payment thereunder except for the return of the amount paid as premium.

If the Insured shall within two years from date of issue of this Policy travel or reside outside the boundaries of Continental United States or the Dominion of Canada, the provisions of this Policy

for Total and permanent disability and for double Indemnity benefits shall be null and void from the date when the Insured leaves the boundaries of Continental United States or the Dominion of Canada, and the Company will on demand refund the pro-rata premium paid for said benefits for the remainder of the current insurance year. The boundaries of Continental United States include the waters within three miles of the Coast line but do not include the Panama Canal Zone.

NEW YORK LIFE INSURANCE CO.
By SEYMOUR M. BALLARD,
Secretary.

New York, Dec. 27th, 1917. (793–17 o D. & D. I.)

[15]

SECTION 7—OPTIONAL METHODS OF SETTLEMENT.

OPTION 1.—The proceeds may be left with the Company subject to withdrawal in whole or in part at any time on demand in sums of not less than one hundred dollars. The Company will credit interest on the proceeds so left with it at such rate as it may each year declare on such funds, at a rate, however, never less than three per cent per annum and credited annually.

OPTION 2.—In equal installments for any agreed number of years.

OPTION 3.—In equal installments for twenty years, and for as many years thereafter as the beneficiary shall survive. The amount of each installment shall be determined by the attained age, on the date of the approval of proofs of death of the In-

sured, of the beneficiary to whom it is payable. If the Insured shall so direct in writing, the installments payable under this option shall not be transferable, nor subject to commutation or incumbrance during the lifetime of the beneficiary.

Any installments under options 2 or 3 shall be payable immediately upon approval of proofs of death of the Insured and annually, semi-annually, quarterly or monthly thereafter as may be agreed.

In the event of the death of a beneficiary any unpaid sum left with the Company under Option 1 shall be paid in one sum; any unpaid installments payable under Option 2, or any installments for the fixed period of twenty years only under Option 3 which shall not have been paid, shall be commuted at three per cent compound interest, and otherwise agreed in writing shall be paid in one sum to the executors or administrators of such beneficiary.

The sums payable under the foregoing options are based upon an assumed interest earning of three per cent, but if in any year the Company shall declare for that year upon funds held by it under such Options interest at a rate greater than three per cent, the sum payable under Option 2, or under Option 3 within the fixed period of twenty years, shall be increased accordingly.

After approval of proofs of the death of the Insured and upon surrender of the Policy, the Company will make and deliver to each Beneficiary a certificate evidencing his or her rights and benefits under the option selected.

Installments options are not applicable to a Pol-

icy which is payable to a corporation or co-partnership, no*t* to policies under which the net sum payable is less than one thousand dollars.

The minimum payments will be $50, when paid annually, $25, when paid semi-annually, $15, when paid quarterly, or $10, when paid monthly, and the total of the fractional payments each year shall equal the annual payment each year as shown in the following tables, which are based upon a Policy, the proceeds of which are $1,000. The figures contained in the table will apply pro rata to this Policy.

OPTION 2.

Number of annual Installments....	2	3	4	5	6	7	8	9	10
Amount of ea. annual Installment..	$507.39	$343.23	$261.19	$211.99	$179.22	$155.83	$138.30	$124.69	$113.81

OPTION 2 (Cont'd).

11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
$	$	$	$	$	$	$	$	$	$	$	$	$	$	$
104.92	97.53	91.29	85.94	81.32	77.29	73.74	70.59	67.78	65.25	62.98	60.91	59.04	57.32	55.75

OPTION 3.

Age of beneficiary at death of insured	0	1	2	3	4	5	6	7	8	9
Amount of each annual instalment	$ 42.48	$ 40.17	$ 39.38	$ 39.06	$ 38.93	$ 38.91	$ 38.96	$ 39.05	$ 39.19	$ 39.35
Age of beneficiary at death of insured	10	11	12	13	14	15	16	17	18	19
Amount of each annual instalment	39.52	39.70	39.88	40.08	40.28	40.49	40.71	40.94	41.18	41.42
Age of beneficiary at death of insured	20	21	22	23	24	25	26	27	28	29
Amount of each annual instalment	41.68	41.95	42.24	42.53	42.84	43.16	43.49	43.84	44.20	44.58
Age of beneficiary at death of insured	30	31	32	33	34	35	36	37	38	39
Amount of each annual instalment	44.98	45.39	45.82	46.27	46.73	47.22	47.73	48.25	48.79	49.36
Age of beneficiary at death of insured	40	41	42	43	44	45	46	47	48	49
Amount of each annual instalment	49.94	50.54	51.17	51.80	52.45	53.12	53.80	54.49	55.19	55.89
Age of beneficiary at death of insured	50	51	52	53	54	55	56	57	58	59
Amount of each annual instalment	56.60	57.29	57.98	58.66	59.32	59.96	60.58	61.16	61.72	62.23
Age of beneficiary at death of insured	60	61	62	63	64	65	66	67	68	69
Amount of each annual instalment	62.71	63.15	63.54	63.89	64.20	64.45	64.67	64.85	64.98	65.09
Age of beneficiary at death of insured	70	71	72	73 and over.						
Amount of each annual instalment	65.16	65.21	65.23	65.25						

6,233.931.

APPLICATION TO THE NEW YORK LIFE INSURANCE COMPANY.

1. George Mason.
(Write name in full.)

1. Residence: State—Mont.
County—Cascade.
Town—Great Falls.
Street—1st Ave. N.
No.—2200.
Name of Firm or Employer—Gerald Café. (Other Occupation, if any)—None. Send all Communications to Res.
Place of Business—Montana. County—Cascade. Town—Great Falls. Street—Central Ave.
Present Occupation—Manager.
State exact duties in full—Manager of Gerald Café.
Born at Grand Rapids, Michigan, on 28th day of Jan., 1878.
Married.
Age nearest birthday—40.
Race or Nationality—White.

APPLY TO NEW YORK LIFE INSURANCE COMPANY FOR INSURANCE AS FOLLOWS:

2. Sum to be insured—$5,000—Premiums Payable Annually.
3. Plan of Insurance—Life 20 Premium with Disability and Double Indemnity Benefits.
4. Dividend to be (b) Applied toward payment of Premium.

5. I agree that if the Company is unwilling to issue a Policy on the plan applied for at the Company's published premium rate corresponding to my age this application shall be for a Policy on the plan and at the Premium rate corresponding with the Company's valuation of the risks.
6. I designate as Beneficiary to receive the proceeds of Policy in event of death and reserve the right to change the Beneficiary from time to time.—Beneficiary (Give name in full) Evelyn E. Who resides at Great Falls, Montana. Relationship to me—Wife.
7. The following is all the Insurance I now have on my life (if none so state)—Name of Company and Am't: None.
8. No other applicaction for Insurance and no application for the reinstatement of any insurance, on my life, is now pending except as follows (if none so state): None.
9. No insurance, no application for insurance, or for the reinstatement of insurance on my life have ever been declined except as follows (if none so state): None.
10. No company has ever issued or offered to issue insurance on my life differing from the insurance I applied for, except as follows (if none, so state): None.

I agree as follows: 1. That the insurance hereby applied for shall not take effect unless the first premium is paid and the Policy is delivered to and received by me during my lifetime and good health,

and that unless otherwise agreed in writing, the policy shall then relate back to and take effect as of the date of this application; 2. That any payment made by me before delivery of the policy to, and its receipt by me as aforesaid shall be binding on the Company only in accordance with the terms of the Company's receipt therefor on the receipt form which is attached to this application and contains the terms of the agreement under which said payment has been made and is the only receipt the agent is authorized to give for such payment; 3. That only the President, a Vice-President, a second Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive any of the Company's rights or requirements and that none of these acts can be done by [18] the agent taking this application.

Dated at Great Falls, Montana, this 14th Day of December, 1917.

Signature of the person applying for Insurance (write the name in full)—George Mason.

Witnessed by V. S. Johnstone, Agent.

Other Agents: ———.

Names and Residences of three intimate friends: Wm. Grills, John Carey.

NOTICE.—The applicant should deposit with the agent a sum not exceeding the amount of the first premium for the insurance applied for, fill out and sign the following declaration and receive from the agent the Company's official receipt on the official receipt form which is attached hereto for that purpose.

Declaration to be signed by applicant upon making any payment with this application.

7B 218077.

MILITARY BLANK (U. S.)

Name—George Mason. No. 6,233.931

This Form must be Signed by the Applicant.

NEW YORK LIFE INSURANCE COMPANY.

346 & 348 Broadway, New York.

The NEW YORK LIFE INSURANCE *LIFE INSURANCE* COMPANY will please accept the following questions and answers as part of my application for insurance, dated the Fourteenth Day of December, 1917.

Question 1.

(a) Are you a member of any Military or Naval organization or Red Cross or other Relief Service? (a) No.

(b) If so, in what branch of service and in what capacity? (b) No.

(c) Do you intend to volunteer for any ~~service~~ such service? If so, give particulars. (c) No.

(d) Are you connected with, or do you intend to take up any form of aviation? If so, give particulars. (d) No. Navy?

(e) Are you connected with any submarine branch of the ~~service~~ (e) No.

Question 2.

(a) Are you liable to Military or Naval service of any Country other than the United States? (a) No.

(b) Do you intend to volunteer for such service?
(b) No.

(c) If so, of what country? (c) No.

Question 3.

(a) Have you within the past five years been engaged in any Military or Naval organization? If so, give particulars. No.
(b)

Question 4.

Is any member of your immediate family entirely dependent on you for support? If so, state particulars. Wife & Baby. [19]

Question 5.

Do you agree that any policy the Company may issue on your application may, if the rules of the/Company so require contain a provision for extra premium or for limiting the liability of the Company if you travel on the high seas engage in Military, Naval, Red Cross or other relief service in experiments with, or ascensions in balloons, aeroplanes or other devices for aerial locomotion; and that if the Policy contains provisions for double indemnity and disability benefits such provisions shall immediately be null and void should you engage in any of the above work or service? Yes.

Dated—Gt. Falls, Mont. 12/14/1917. George Mason, Applicate.

Witness—V. S. Johnston.

Forwarded to Division of Policy Issues from ——, Branch Office, ————, 191—.

Military—Naval.

Red Cross or Relief Service.

917–43.

6 6,233.931

THIS EXAMINATION MUST BE MADE IN PRIVATE; NO AGENT OR THIRD PERSON BEING PRESENT.

(To be filled by the medical examiners only)

ANSWERS MADE TO THE MEDICAL EXAMINERS,

In continuation and forming a part of my application for insurance in the NEW YORK LIFE INSURANCE COMPANY

1. A. What is your occupation? (Full details.) A. Resturant Business.
   B. How long have you been engaged in your present occupation? B. 20 years.
   C. What was your previous occupation? C. Same.
   D. Do you contemplate making any change, temporary or permanent in your occupation? If so, give full detail. D. No.
2. Do you contemplate changing your residence or making a journey or is there any probability that you will do either? (If so, give full details.) No.
3. In what state have you lived the last ten years and which years in each? (If outside of the U. S. in what countries and which years in each.) Alaska and Montana.
4. A. Have you now any connection direct or indirect with the manufacture or sale of wines, spirits or malt liquors? A. No.
   B. Have you *have* any such connections? (If so, in either case give full details) B. No.
5. A. How frequently if at all and in what quantity do you use beer, wine, spirits or other intoxicants? A. Does not use them.

   [20]

   B. How frequently if at all and in what quantity have you used any of them in the past? B. Same.
   C. Have you within the last five years used any of them to excess? C. No.
   D. Do you now or have you ever used morphine, cocaine, or any other habit forming drug? D. No.
6. What is the name of the agent through whom you are making application? V. S. Johnston.
7. A. Has any Life Insurance Company or Society ever examined you either on an application for insurance for reinstatement of insurance or for any other reason without issuing or reinstating such insurance? A. No.
   B. Has any Life Insurance or Society ever issued or offered to issue a Policy on your Life differing from the one then applied for; or have you applied for the reinstatement of a Policy and been offered a different contract? B. No.

THE APPLICANT MUST ANSWER THESE QUESTIONS FULLY AND WITH SPECIAL CARE.

8. Have you ever suffered from any ailment or disease of,	Yes or No.	Name of disease ailment or injury.	Number of attacks.	Date.	Duration.	Severity.	Results and if within five years name and address of every physician consulted.
A. The brain or nervous system.	No.	*	*	*	*	*	*
B. The heart or lungs.	No.	*	*	*	*	*	*
C. The stomach or intestines, liver, kidneys or bladder,	No.	*	*	*	*	*	*
D. The skin, middle ear or eyes,	No.	*	*	*	*	*	*
E. Have you ever had rheumatism, gout or syphilis?	No.	*	*	*	*	*	*
B. Have you ever raised or spit blood. (If so, give full details.)	No.	*	*	*	*	*	*
C. Have you ever had any accident or injury.	No.	*	*	*	*	*	*
D. Have you ever consulted a physician for any ailment or disease not included in your above answers?	No.	*	*	*	*	*	*

E. What physician or physicians, if any not named above, have you consulted or been treated by within the last five years and for what illness or ailment?	Name and address of physician.	Date and details of illness.	Results.
	*	*	*
If none, so state.	None.		

[21]

10. Family record.		Age if living.	Condition of health if not good state full details.	Age at death.	Cause of death.	How long ill.	Details.	Previous health.
Father		*	*	50	Killed while hunting.			Good
Mother		*	*	42	Cancer Uterus			
Brothers	0	*	*	*	*	*	*	*
Sisters	3	42	Good	*	Note.—If the death was not due to acute disease give details of last attacks and in case of parents the year of death.			
		36	Good	*				
		34	Good	*				

11. A. Has any person in your immediate household now ill with consumption? **No.**
B. Or has any one of them recently suffered from or died of that disease? B. **No.**

I AGREE, REPRESENT AND DECLARE on behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers, that they are each written as made by me, that each of them is full, complete and true, and that I am a proper subject for life insurance. Each and all of my said statements, representations and answers contained in this application are made by me to obtain said insurance, and I understand and agree that they are each material to the risk and that the Company believing them to be true will rely and act upon them.

I expressly waive upon behalf of myself and if any person who shall have or claim any interest in any Policy issued hereunder all provisions of law forbidding any Physician or other person who has heretofore attended or examined me or may hereafter attend or examine me from disclosing any knowledge or information which he thereby acquires.

Dated this 15th day of December, 1917.

Signature of the person applying for insurance:

GEORGE MASON.

Witnessed by CLARKE S. SMITH, M. D.,

Medical Examiner. [22]

The petition for removal of said cause contained in said transcript on removal is in the words and figures following, to wit: [23]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Petition for Removal.

To the Honorable, the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade:

Now comes your petitioner, New York Life Insurance Company of New York, the above-named defendant, by its attorneys, Walsh, Nolan & Scallon, and respectfully shows to this Honorable Court that this is a suit of a civil nature at law of which the District Court of the United States for the District of Montana, Great Falls Division, is given jurisdiction by the Judicial Code, Title, "The Judiciary," and your petitioner makes and files this its petition and a bond conditioned as required by law for the purpose of removing said suit from this court into the District Court of the United States for the District of Montana, Great Falls Divi-

sion, and thereupon your petitioner says:

1. That your petitioner, the defendant in said suit, is required by the laws of the State of Montana and the rules of said District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade, in which said suit is brought, to answer or plead to the complaint of the plaintiff within twenty days from and after the service of the summons and complaint of the plaintiff on said defendant, and that said summons and complaint was served on said defendant on, to wit, the 7th day of August, 1919, and that [24] the time has not elapsed within which your petitioner is required by the laws of Montana and the rules and practice of said District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade, to answer, plead or demur to said plaintiff's complaint, nor has your petitioner, the defendant in said cause, either pleaded, answered or demurred to said complaint or otherwise appeared in said suit.

2. That there is a controversy in said suit and that said controversy is between citizens of different states; that the plaintiff in said suit, to wit, the said Evelyn E. Mason, was at the commencement of said suit, thence has been, and still is, a resident, citizen and inhabitant of the State and District of Montana, and of the Great Falls Division of said District, residing at Great Falls, in Cascade County, in said Great Falls Division, and a nonresident of the State of New York and of the Southern District thereof, and that your petitioner, New York Life Insurance Company of New York, New York, the defend-

ant in said suit, was at the commencement thereof, thence has been, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen, resident and inhabitant of the State of New York and of the Southern District of New York, and a nonresident of the State and District of Montana and of the Great Falls Division of said District, and that the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

3. That your petitioner now here makes and files with this its petition for removal, a bond in the sum of $300.00 with good and sufficient surety, conditioned for its entering in the District Court of the United States for the District of Montana, Great Falls Division, within thirty days from the date of filing this its petition, a certified copy of the record in said suit and for paying all costs that may be awarded by said District Court, if said District Court shall hold that said suit was wrongfully or improperly removed thereto, and also for its appearing and entering special bail in said suit, if special bail was originally requisite therein, and that your petitioner has given to the adverse parties written notice of this petition and bond for removal prior to the [25] filing of the same.

Your petitioner therefore prays this Honorable Court to accept this petition and said bond and to proceed no further in said suit except to make an order removing said suit to the United States District Court for the District of Montana, Great Falls Division, and to direct a certified copy of the record here-

in to be made by said Court, as required by law.

And as in duty bound your petitioner will ever pray.

NEW YORK LIFE INSURANCE COMPANY.

By WALSH, NOLAN & SCALLON,

Its Attorneys.

JAMES H. McINTOSH,

Of Counsel.

State of Montana,
County of Lewis and Clark,—ss.

C. B. Nolan, being first duly sworn upon oath, deposes and says: That he is one of the attorneys for the New York Life Insurance Company, the petitioner named in the foregoing petition, and makes this affidavit for and on behalf of said New York Life Insurance Company for the reason that said petitioner is a corporation and none of the officers of said corporation is within the county of Lewis and Clark, wherein affiant now is and resides and where this affidavit is made.

That affiant has read the said petition and knows the contents thereof, and that the matters and things in said petition contained are true to the best of affiant's knowledge, information and belief.

C. B. NOLAN.

Subscribed and sworn to before me this 25th day of August, 1919.

[Seal] ALICE NELSON,

Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires Feb. 26th, 1922. [26]

To Evelyn E. Mason, Plaintiff in the Foregoing Entitled Action, and to George A. Judson, Her Attorney:

PLEASE TAKE NOTICE that the New York Life Insurance Company of New York, the defendant in said suit and the petitioner aforesaid, will duly file the foregoing petition for removal and the bond therein referred to in the District Court of Cascade County, Montana, and will present said petition and bond to the Honorable Jerry Leslie, Judge of said District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, at Great Falls, on the 27th day of August, 1919, at 10 o'clock A. M., of said day, or as soon thereafter as counsel can be heard, and will there and then move the Court for an order in accordance with the prayer of said petition.

NEW YORK LIFE INSURANCE COMPANY.

By WALSH, NOLAN & SCALLON,

Its Attorneys. [27]

Thereafter, on October 16, 1919, answer of the defendant was duly filed herein, in the words and figures following, to wit: [28]

In the District Court of the United States, for the District of Montana, Great Falls Division.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Answer.

Now comes the above-named defendant, and answers the plaintiff's complaint as follows:

For a first defense, defendant alleges:

I.

That the policy alleged in the plaintiff's complaint was issued by the defendant by reason and in consideration of the written application therefor made and signed by the said George Mason in part on the 14th day of December, 1917, and in part on the 15th day of December, 1917, and completed on the last-mentioned day, to wit, the application, of which a copy forms part of Exhibit "A" attached to the plaintiff's complaint herein; that in the said application the said George Mason made the following statements and representations, among others, in answer to questions put to him as follows, to wit:

"5–A. How frequently, if at all, and in what quantity do you use beer, wine, spirits or other intoxicants? A. Does not use them.

B. How frequently, if at all, and in what quantity have you used and of them in the past? B. Same.

C. Have you within the last five years used any of them to excess? C. No.

D. Do you now or have you ever used morphine, cocaine, or other habit-forming drug? D. No."

That in addition to the above, the said George Mason in his said application made the statement and answer that his father had been "killed while hunting"; that [29] the said application also contained the following clause, statements and agreements at the end thereof, and which were signed by the said George Mason on the said 15th day of December, 1917, to wit:

"I AGREE, REPRESENT AND DECLARE, on behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers, that they are each written as made by me, that each of them is full, complete and true, and that I am a proper subject for life insurance. Each and all of my said statements, representations and answers contained in this application are made by me to obtain said insurance, and I understand and agree that they are each material to the risk, and that the Company believing them to be true will rely and act upon them."

That a copy of the said application was, in fact, attached to and made part of the policy of insurance

executed by the defendant and issued to the said George Mason and alleged in the complaint.

II.

The defendant avers on information and belief that each of the said several statements and representations so made by the said George Mason were false in this, to wit, that it was not true that at the time he made the said application he did not use at all or did not use frequently beer, spirits or other intoxicants, and avers the fact to be that he did use and use frequently beer, spirits and other intoxicants, and had been in the habit of so doing for many years.

That it was not true that the defendant had not used at all or used frequently beer, spirits or other intoxicants in the past, to wit, prior to the making of his said application, and avers, on the contrary, that the said George Mason had in the past, to wit, for many years prior to the making of his said application used and used frequently beer, spirits and other intoxicants; that it was not true that the said George Mason had not used any of them, in the five years preceding the date of his application, to excess; that it was not true that the said George Mason had never used or was not, at the time of making his application, [30] using morphine, cocaine or any other habit-forming drug, and avers that on the contrary that he was at said time and had been for a long time prior thereto, addicted to the use of morphine and other habit-forming drugs; that it was not true that the father of the said George Mason had been killed while hunting, and avers, on the contrary, that the father of the said George Mason had committed sui-

cide; that the said false statements and false representations so made by the said George Mason were made by him wilfully and fraudulently, and with the knowledge that they were false, and with the intent to deceive the defendant and the intent to induce the defendant to enter into the proposed contract of insurance, and to issue to him the said policy of insurance; that the aforesaid false statements so made by the said insured were material to the risk and were believed by this defendant and relied upon by it, and that the said policy was thereafter issued by reason of the said statements and in reliance thereon.

III.

The defendant further alleges that the said George Mason, in making his said application to this defendant, concealed and at all times thereafter until his death, suppressed and concealed from the defendant the facts about which he had been interrogated, as aforesaid, and concerning which he had made the foregoing answers, and all of said facts; that these facts were material and their suppression and concealment were likewise material; that the defendant was thereby prevented from making inquiries which it would have made if this suppression and concealment had not been made; that by the said suppression and concealment, the said defendant was also prevented from exercising his judgment as to whether or not the said George Mason was a fit subject to be insured by said defendant, and whether the amount of the insurance that he was applying for was excessive or not; that the said Mason falsely and fraudulently omitted to make known the said facts, or any

of them, to the said defendant, with the intent to deceive the defendant, and to induce it to issue said policy; that if the defendant had known the truth about the matters inquired of in the questions above set forth and designated as 5–A, 5–B and 5–C, it would not have issued the said policy without making specific and close inquiries into the habits of the said George Mason, and making further examinations of him, physical and others, to ascertain and [31] determine to what extent, if at all, the use of beer, spirits or other intoxicants, were likely to affect his health or shorten his life, and also how frequently he used any of said liquors to excess, and whether the doing of that was likely to impair his health or shorten his life, and that if the defendant had found that such habits or doings of the said George Mason were likely to impair his health or shorten his life, it would not have issued the said policy to him.

That if the defendant had known that the said George Mason was addicted to the use of morphine or cocaine or other habit-forming drugs, it would not have issued any policy to him at all; that if the said defendant had been informed or had known at the time that the father of said George Mason had committed suicide, it would have made further and detailed inquiries regarding the said George Mason and his mental condition and his physical, business, family and social conditions, before determining whether it would issue to him the policy or not, and that if these inquiries had led defendant to believe or to fear that the said George Mason might have been disposed to

commit suicide, it would not have issued any policy to him.

IV.

That this defendant did not know and did not learn until after the death of the said George Mason the truth about any of the matters hereinbefore alleged.

V.

The defendant, without admitting any obligation so to do, is able and willing to return, and hereby offers to return to whomsoever may be entitled thereto, the premium paid by the said George Mason to obtain the said policy, as well as the premium subsequently paid by him, amounting in the aggregate to the sum of four hundred and forty-five dollars ($445.00), and hereby offers to bring the same into court.

That the said George Mason left a will, and that the same has been probated in the district court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, and that the said Evelyn E. Mason has been appointed and has qualified as executrix, and is now acting as such;

That the defendant has heretofore and before the commencement of this suit, tendered the said sum to the said [32] Evelyn E. Mason, but that she refused and declined to accept the same.

That the defendant now brings said sum into court, and that if, for any reason, said sum should be found insufficient, said defendant offers to make up and pay any additional sum that may be required and to do anything and everything else that may be required

of it in the premises, in pursuance of this defense and in conformity therewith.

And for another and separate defense, the defendant:

I.

Admits that Exhibit "A" attached to the complaint is substantially a copy of the policy alleged in the complaint and issued by the defendant to said George Mason, but for greater certainty, the defendant refers to the original and prays that it be produced at the trial.

II.

Avers that the said policy was issued in consideration of the application, statements and representations included in and forming part of the application for said policy made and presented to the said company by the said George Mason, as well as of the premium paid by him.

The defendant avers that part of the consideration for which the said policy was issued failed through the fault of the said George Mason in this, to wit, that the statements and representations made by the said George Mason in his application were and are false in the following particulars, to wit:

That the policy alleged in the plaintiff's complaint was issued by the defendant by reason and in consideration of the written application therefor made and signed by the said George Mason in part on the 14th day of December, 1917, and in part on the 15th day of December, 1917, and completed on the last-mentioned day, to wit, the application, of which a copy forms part of Exhibit "A" attached to the plaintiff's com-

plaint herein; that in the said application the said George Mason made the following statements and representations, among others, in answer to questions put to him as follows, to wit:

"5.–A. How frequently, if at all, and in what quantity do you use beer, wine, spirits or other intoxicants. A. Does not use them. [33]

B. How frequently, if at all, and in what quantity have you used any of them in the past? B. Same.

C. Have you, within the last five years, used any of them to excess? C. No.

D. Do you now or have you ever used morphine, cocaine, or other habit-forming drug? D. No."

That in addition to the above, the said George Mason in his said application made the statement and answer that his father had been "killed while hunting"; that the said application also contained the following clause, statements and agreements at the end thereof, and which were signed by the said George Mason on the said 15th day of December, 1917, to wit:

"I AGREE, REPRESENT AND DECLARE, on behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers, that they are each written as made by me, that each of them is full, complete and true, and that I am a proper subject for life insurance. Each and all of my said statements, representations and answers contained in

this application are made by me to obtain said insurance, and I understand and agree that they are each material to the risk, and that the Company believing them to be true will rely and act upon them."

That a copy of the said application was, in fact, attached to and made part of the policy of insurance executed by the defendant and issued to the said George Mason and alleged in the complaint.

III.

The defendant avers on information and belief that each of the said several statements and representations so made by the said George Mason were false in this, to wit, that it was not true that at the time he made the said application he did not use at all or did not use frequently beer, spirits or other intoxicants, and avers the fact to be that he did use and use frequently beer, spirits and other intoxocants, and had been in the habit of so doing for many years. [34]

That it was not true that the defendant had not used at all or used frequently beer, spirits or other intoxicants in the past, to wit, prior to the making of his said application, and avers, on the contrary, that the said George Mason had in the past, to wit, for many years prior to the making of his said application used and used frequently beer, spirits and other intoxicants; that it was not true that the said George Mason had not used any of them, in the five years preceding the date of his application, to excess; that it was not true that the said George Mason had never used or was not, at the time of making his application, using morphine, cocaine or any other habit-

forming drug, and avers that on the contrary that he was at said time and had been for a long time prior thereto, addicted to the use of morphine and other habit-forming drugs; that it was not true that the father of the said George Mason had been killed while hunting, and avers, on the contrary, that the father of the said George Mason had committed suicide; that the said false statements and false representations so made by the said George Mason were made by him wilfully and fraudulently, and with the knowledge that they were false, and with the intent to deceive the defendant and the intent to induce the defendant to enter into the proposed contract of insurance, and to issue to him the said policy of insurance; that the aforesaid false statements so made by the said insured were material to the risk and were believed by this defendant and relied upon by it, and that the said policy was thereafter issued by reason of the said statements and in reliance thereon.

IV.

The defendant further alleges that the said George Mason in making his said application to this defendant, concealed and at all times thereafter until his death, suppressed and concealed from the defendant the facts about which he had been interrogated, as aforesaid, and concerning which he had made the foregoing answers, and all of said facts; that these facts were material and their suppression and concealment were likewise material; that the defendant was thereby prevented from making inquiries which it would have made if this suppression and concealment had not been made; that by the said suppression and con-

cealment, the said defendant was also prevented from exercising its [35] judgment as to whether or not the said George Mason was a fit subject to be insured by said defendant, and whether the amount of the insurance that he was applying for was excessive or not; that the said Mason falsely and fraudulently omitted to make known the said facts, or any of them, to the said defendant, with the intent to deceive the defendant, and to induce it to issue said policy; that if the defendant had known the truth about the matters inquired of in the questions above set forth and designated as 5–A, 5–B, and 5–C, it would not have issued the said policy without making specific and close inquiries into the habits of the said George Mason, and making further examinations of him, physical and others, to ascertain and determine to what extent, if at all, the use of beer, spirits or other intoxicants, were likely to affect his health or shorten his life, and also how frequently he used any of said liquors to excess, and whether the doing of that was likely to impair his health or shorten his life, and that if the defendant had found that such habits or doings of the said George Mason were likely to impair his health or shorten his life, it would not have issued the said policy to him.

That if the defendant had known that the said George Mason was addicted to the use of morphine or cocaine or other habit-forming drugs, it would not have issued any policy to him at all; that if the said defendant had been informed or had known at the time, that the father of said George Mason had committed suicide, it would have made further and de-

tailed inquiries regarding the said George Mason and his mental condition and his physical, business, family and social conditions before determining whether it would issue to him the policy or not, and that if these inquiries had led defendant to believe or to fear that the said George Mason might have been disposed to commit suicide, it would not have issued any policy to him.

VI.

Alleges that the proofs which the plaintiff did furnish and present to the defendant were false and misleading in material particulars, that is to say, that the death of the insured was due to self-destruction, and that the said insured committed suicide, and that his death was not due to natural [36] causes, but that the proofs did not state any of these facts and concealed the same, and that they did not truly state the cause of the death of the said insured; that thereby the proofs tended to mislead and deceive the defendant.

VI.

Denies that the sum of five thousand dollars ($5,000.00) is due or ever has been due from the defendant to the plaintiff or to anyone on account of the policy of insurance alleged in the complaint, or on any account, and denies that there is now or ever was due from the defendant to the plaintiff, or to anyone on account thereof, more than four hundred and forty-five dollars ($445.00).

And for another and separate defense, the defendant alleges:

I.

That the policy alleged in the complaint contains the following provisions, to wit:

> "Self-destruction.—In event of self-destruction during the first two insurance years, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company and no more."

That the said clause appears in Exhibit "A" attached to the plaintiff's complaint herein.

II.

Defendant avers on information and belief that the said George Mason did not die a natural death, but, on the contrary, his death was caused by self-destruction; that is to say, that the said George Mason committed suicide and destroyed his own life by shooting himself with a pistol.

III.

That only two premiums had been paid to defendant under or on account of said policy up to the time of the death of the said George Mason, which [37] premiums amounted to the sum of $445.00; that the defendant has ever been ready and willing to pay the said sum of $445.00 and did, prior to the commencement of the suit, tender and offer to pay the same to the plaintiff, but that the said payment was refused; that the said defendant now brings the said sum into court with this its answer.

WHEREFORE the defendant prays that plaintiff's action herein be dismissed with costs.

WALSH, NOLAN & SCALLON,
Attorneys for Defendant. [38]

State of Montana,
County of Lewis and Clark,—ss.

Wm. Scallon, being first duly sworn upon oath, deposes and says: That he is one of the attorneys for the New York Life Insurance Company, the defendant named in the foregoing entitled action, and makes this verification for and in behalf of the said defendant; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

That the reason this verification is made by deponent and not by defendant is that defendant is a corporation and none of its officers are within the county of Lewis and Clark, wherein deponent is and resides.

WM. SCALLON.

Subscribed and sworn to before me this 15th day of October, 1919.

[Seal] H. G. PICKETT,
Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires February 26, 1921.

Filed Oct. 16, 1919. C. R. Garlow Clerk. [39]

Thereafter, on November 7th, 1919, reply to answer was duly filed herein, being in the words and figures following to wit: [40]

In the District Court of the United States, for the District of Montana, Great Falls Division.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE CO., a Corporation.

Reply.

Now comes the above-named plaintiff and for reply to the answer of the defendant filed herein alleges:

I.

That she has not sufficient knowledge or information upon which to form a belief as to the allegations set forth in the first paragraph of the defendants said answer and therefore denies the same.

II.

Plaintiff denies each and every allegation, matter and thing set forth in the second paragraph of defendants said answer and the whole of each and every part thereof.

III.

As to the allegations set forth in the first paragraph of paragraph marked three of defendants answer, plaintiff alleges that she has no knowledge or information thereof sufficient to form a belief and therefore denies the same.

IV.

Plaintiff specifically denies each and every allegation and each and every part of each and every allegation set forth in the fourth paragraph of defendants' said answer [41]

V.

Plaintiff admits that the said George Mason left a will and that the same has been probated in the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade, and that the said Evelyn E. Mason has been appointed and has qualified as executrix and is now acting as such.

Further replying to the allegations of paragraph five this plaintiff denies each and every allegation therein set forth except as hereinafter specifically admitted, qualified or denied.

VI.

Replying to the defendants alleged separate defense, plaintiff alleges that she has no knowledge or information thereof sufficient to form a belief as to the allegations of the second paragraph of said alleged separate defense and therefore denies the same.

VII.

Plaintiff specifically denies each and every allegation and each and every part of each and every allegation set forth in the third paragraph of defendants' alleged separate defense.

VIII.

Plaintiff specifically denies the allegations set forth in the fourth paragraph of defendants alleged separate defense.

IX.

Plaintiff specifically denies the allegations set forth in paragraph six of said separate defense and the whole and each and every part thereof. [42]

Further replying to that portion of defendant's said action which is alleged as another and separate defense: Plaintiff admits the first paragraph of said second alleged separate defense but denies each and every other allegation, matter and thing set forth in defendant's alleged second separate defense as the whole and each and every part thereof.

X.

Plaintiff denies each and every allegation and each and every part of each and every allegation set forth in defendant's said answer except as herein specifically admitted qualified or denied.

WHEREFORE, plaintiff having fully replied to defendant's answer, prays judgment as demanded in her complaint.

GEORGE A. JUDSON,
Attorney for Plaintiff. [43]

State of Montana,
County of Cascade,—ss.

Evelyn E. Mason, being first duly sworn, upon oath, deposes and says:

That she is the plaintiff named in the foregoing action; that she has read the foregoing reply and knows the contents thereof; that the matters and things therein stated are true to the best of her knowledge except as to those matters therein stated

on information and belief and as to those matters she believes it to be true.

EVELYN E. MASON.

Subscribed and sworn to before me this 4th day of Nov., A. D. 1919.

[Seal] GEORGE A. JUDSON,

Notary Public for the State of Montana, Residing at Great Falls.

My commission expires Apr. 1, 1920.

Filed Nov. 7, 1919. C. R. Garlow, Clerk. [44]

Thereafter, on December 22, 1919, motion for leave to strike from the answer and file a substituted answer was duly filed herein in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Motion for Leave to Strike from Answer and File Substituted Answer.

Now comes the above-named defendant and moves this Honorable Court to be permitted to strike from its answer herein all of the first defense therein set forth; also all of the second defense therein set forth,

and for leave to file *nunc pro tunc* a substitute answer in conformity with the foregoing, to wit, an answer omitting the first and second defenses set forth in such original answer.

WALSH, NOLAN and SCALLON,
FLETCHER MADDOX,
Attorneys for Defendant.

Filed December 22, 1919. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [45]

Thereafter, on December 22, 1919, at the trial of said cause, by leave of Court, the complaint was amended by interlineation and substituted answer filed, the journal record thereof being in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

No. 783.

EVELYN E. MASON
vs.
NEW YORK LIFE INS. CO.

Order Allowing Amendment to Complaint and Answer.

This cause came on regularly for trial this day, Geo. A. Judson, Esq., appearing for plaintiff, and Wm. Scallon, Esq., and Fletcher Maddox, Esq., appearing for the defendant. * * * Thereupon defendant filed and presented a written motion to

strike from its answer and to file *nunc pro tunc* a substitute answer herein, and there being no objection, the motion was granted and such substituted answer filed, the reply heretofore filed to stand as the reply to the substituted answer. Thereupon, by consent, plaintiff was granted leave to amend her complaint by interlineation. * * *

Entered in open court, December 22, 1919.

C. R. GARLOW,
Clerk. [46]

Thereafter on December 22, 1919, amended and substituted answer was duly filed herein in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

EVELYN E. MASON,
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Defendant.

Amended and Substituted Answer.

Now comes the above-named defendant, and by leave of Court first had and obtained, files this, its amended and substituted answer as follows:

The defendant alleges:

I.

That the policy alleged in the complaint contains the following provision, to wit:

"Self-destruction.—In the event of self-destruction during the first two insurance years, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company and no more."

That the said clause appears in Exhibit "A" attached to the plaintiff's complaint herein.

II.

Defendant avers on information and belief that the said George Mason did not die a natural death, but, on the contrary, his death was caused by self-destruction; that is to say, that the said George Mason committed suicide and destroyed his own life by shooting [47] himself with a pistol.

III.

That only two premiums had been paid to defendant under or on account of said policy up to the time of the death of the said George Mason, which premiums amounted to the sum of Four Hundred Forty-five Dollars ($445.00); that the defendant has ever been ready and willing to pay the said sum of money, and did, prior to the commencement of the suit, tender and offer to pay the same to the plaintiff, but that the said payment was refused; that the said defendant now brings the said sum into court with this, its answer.

WHEREFORE, the defendant prays that plaintiff's action herein be dismissed with costs.

WALSH, NOLAN & SCALLON,
FLETCHER MADDOX,
Attorneys for Defendant. [48]

State of Montana,
County of Cascade,—ss.

Wm. Scallon, being first duly sworn upon oath, deposes and says: That he is one of the attorneys for the New York Life Insurance Company, a corporation, the defendant named in the foregoing entitled action, and makes this verification for and in behalf of the said defendant; that he has read the foregoing answer and knows the contents thereof; and that the same is true to the best of his knowledge, information and belief.

That the reason this verification is made by deponent, and not *be* defendant, is that defendant is a corporation and none of its officers are within the county wherein deponent is.

WM. SCALLON.

Subscribed and sworn before me this 22d day of December, 1919.

C. R. GARLOW,
Clerk United States District Court, District of Montana.

Filed December 22, 1919, *nunc pro tunc,* as of Oct. 16, 1919. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [49]

Thereafter, on December 23, 1919, the verdict of the jury was duly rendered and entered herein, in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and against the defendant for the sum of $5,000.00, and interest from the 12th day of May, A. D. 1919, at the rate of 8% per annum.

GORDON FERGUSON,
Foreman of the Jury.

Filed Dec. 23, 1919. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [50]

Thereafter, on December 26, 1919, judgment was duly rendered and entered herein in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

No 783.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Judgment on Verdict.

This action came on regularly for trial at Great Falls, Montana, on the 22d day of December, A. D. 1919, the said parties appeared by their attorneys, George A. Judson and H. R. Eickemeyer, counsel for the plaintiff, and William Scallon and Fletcher Maddox, counsel for the defendant. A jury of twelve persons was regularly empaneled and sworn to try said cause. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into court, the following verdict, to wit: [51]

In the District Court of the United States in and for the District of Montana.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff and against the defendant for the sum of $5,000.00 and interest from the 12th day of May, A. D. 1919, at the rate of 8% per annum.

GORDON FERGUSON,
Foreman of the Jury."

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed, that the plaintiff do have and recover from said defendant, the sum of $5,000.00, with interest thereon from the 12th day of May, 1919, at the rate of 8% per annum and her costs and disbursements taxed and allowed for the sum of $61.95.

Judgment entered this 26th day of December, A. D. 1919.

C. R. GARLOW,
Clerk of said Court. [52]

Thereafter, on March 16th, 1920, defendant's bill of exceptions was duly settled, allowed and filed herein, being in the words and figures following, to wit: [53]

In the District Court of the United States for the District of Montana.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Defendant's Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came regularly on for trial in the above-entitled court on the 22d day of December, 1919, at Great Falls, Montana, the Honorable George M. Bourquin, Judge, presiding. Mr. George A. Judson and Mr. H. R. Eickemeyer appeared as attorneys for the plaintiff, and Messrs. Walsh, Nolan & Scallon and Mr. Fletcher Maddox appeared as attorneys for the defendant. On motion of the defendant, the Court ruled that the defendant had the right to open and close. Thereupon a jury of twelve persons was called, empanelled and sworn to try the cause. Thereupon the following proceedings were had and the following evidence, and none other, was introduced, and the following sets forth all of the evidence introduced by the respective parties on the

trial of the said cause or offered on the part of the defendant and excluded, to wit: [54]

DEFENDANT'S CASE.

Testimony of Dr. Richard B. Durnin, for Defendant.

DR. RICHARD B. DURNIN, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him, testified as follows:

Direct Examination.

Mr. SCALLON.—Q. Dr. Durnin, will you state your full name? A. Richard Brown Durnin.

Q. Doctor, please state out loud so the jurors will hear you distinctly. You are a physician and surgeon? A. I am.

Q. How long have you been in practice?

A. Eleven years.

Q. Where?

A. Nine and a half years here and two years in the hospitals.

Q. You are a graduate physician?

A. Of Toronto University, Medical College.

Q. Did you know the deceased George Mason, about whom we are speaking in this case? A. Yes.

Q. Did you attend him? A. I did.

Q. At any time in the month of May of this year?

A. I did.

Q. Will you state what occurred?

A. I was called about 3:30 in the afternoon by Oscar Frederickson from my office; I went up with Oscar Frederickson in my automobile to his house. When I arrived there Mrs. Mason met us either at the

(Testimony of Dr. Richard B. Durnin.)

front door or in the front room. I had already been told—

The COURT.—Not what you had been told.

A. I went into the bedroom, saw George Mason lying in the bed, examined him, found that he had received two wounds in the front left side of the body, a short distance below the heart, that he evidently was suffering from loss of blood internally, very little blood externally. I examined back of his body to find whether the bullets had come out and I [55] saw where there were two openings in his union suit. I decided that it was a—(interrupted, then continuing:)

A. I phoned for the ambulance and took him to the Deaconess Hospital, where he was operated on, and found that his abdomen was full of blood, that the principal injury done in the abdomen was from a bullet cutting the spleen practically half in two,—the spleen being a very vascular organ it bled a very great deal into his abdominal cavity. He was in very poor condition; no extensive work could be done; we put a pack against the spleen to stop the hemorrhage; ordinarily we would have put sutures in the spleen; his condition was such that the quicker way we could stop the hemorrhage the better chances he would have. He did not recuperate and died before he left the operating-table.

Q. Now, Doctor, will you please describe the wounds as to their courses through the body, the entrance and exit? A. May I refer to my notes?

The COURT.—Made at the time or afterwards?

(Testimony of Dr. Richard B. Durnin.)

A. Shortly afterwards.

The COURT.—While fresh in your recollection?

A. Yes.

Q. (By Mr. SCALLON.) Did you perform an autopsy on him? A. I did.

Q. When? A. The evening before the inquest.

Q. Can you give the date? A. May 6th, 1919.

Q. Was it the same day on which he died or the next day?

A. I rather think it was two days after.

Q. Two days after?

A. I rather think it was, two days after.

Q. Anyhow, you performed the autopsy?

A. Yes, sir.

Q. You may proceed to describe the wounds.

A. The inner bullet wound entered one inch to the left of the median line, that is the center line of the body, one inch to the left; it went through the front anterior portion of the diaphragm; the diaphragm is the muscle between the abdominal cavity and the chest or thoracic cavity; through [56] the left border of the liver, through the stomach, through the upper and outer part of the left kidney, through the intercostal space behind, passing out three inches from the spine. The outer bullet wound, the entrance was two and one-half inches to the left of the median line, through the sixth intercostal space, almost severing the intercostal artery, touching the lower part of the pericardial sac—the pericardial sac is the sac surrounding the heart—through the diaphragm, through the spleen, cutting it almost in two,

(Testimony of Dr. Richard B. Durnin.)

again through the diaphragm, through the lower border of the lobe of the left lung, through the ninth intercostal space, passing out about six inches to the left side. The pleura cavity of the left side was filled with a large quantity of blood.

Q. Doctor, were the points of exit on the left side of the spine or on the right side?

A. On the left side.

Q. On the left side? Were they farther away from the spine itself, the line of the spine, than the hole where the bullets went in? A. They were.

Q. The course, then, if I understand you, would be what—outward or inward?

A. To the left outward.

Q. Outward; and were they up or down?

A. Slightly down.

Q. Slightly down. Now, I will ask you to state, what, if anything, Mrs. Mason said when you went into the house?

A. Well, of course, it is hard for me to remember what was said when she met me at the door or the front room. She told me that Mr. Mason was in the bedroom, that he was shot. I know positively she did not have time to tell very much because I went very quickly from the front door to see the patient himself; she showed the way. I don't recall anything further.

Q. At that time? A. Yes.

Q. Well, now, what, if anything, did she say or do about a pistol?

A. Later I asked where the gun was, and either she

(Testimony of Dr. Richard B. Durnin.)

or Oscar Frederickson— [57]

Mr. JUDSON.—Just a minute; anything that any other person said is hearsay, and ask to have it stricken out; I couldn't anticipate it beforehand, and ask the witness not to testify to anything said by any other person.

The COURT.—Not what any other person may have done or said.

Q. What she said, if you remember, or did?

A. I found the gun in the buffet drawer.

Mr. JUDSON.—We ask to have that stricken out as not responsive to the question; what she said is what he asked.

The COURT.—Let it be stricken.

A. Your Honor, I can't tell which told me that particular thing.

The COURT.—I didn't know, but what? The location of the gun.

A. Yes.

Q. Was she present when it was told to you?

A. Yes.

The COURT.—I think he may answer as to that. I cannot imagine there will be any dispute over the gun.

A. Either she or Oscar Frederickson told me where the gun was.

Q. And what did you do? A. I got the gun.

Q. What sort of a gun was it?

A. It was a Colt automatic.

Q. Do you remember the caliber?

A. I do not. I am not familiar with revolvers.

(Testimony of Dr. Richard B. Durnin.)

Q. What did you do with it?

A. I put it in my pocket.

Q. And later what did you do with it? Just tell us what you did with the gun from that time on?

A. From that time I put it in my pocket, I took it over to the Deaconess' Hospital; there is a locker in the doctors' dressing-room or scrubbing-up room; I took and put a sheet of adhesive plaster round the gun and wrote my name on the adhesive plaster and put it on a shelf on the upper part of one of those lockers. The day of the inquest I took the gun and gave it to either the coroner or the sheriff without opening the gun, doing anything with it any further than putting the safety catch on. [58]

Q. Have you seen it since?

A. I saw it the night of the inquest. From that time I have not seen it.

Q. Do you remember how Mr. Mason was dressed when you saw him?

A. As I recall, he had his trousers, union suit and a shirt.

Q. Union suit of underwear, do you mean?

A. Yes.

Q. What marks did you see, if any, upon this clothing?

A. I saw where two bullets had come out of the back of his union suit.

Q. Anything in front? A. No.

Q. Did it have sleeves or not, the union suit?

A. I cannot recall.

(Testimony of Dr. Richard B. Durnin.)

Q. Did you notice any marks upon the body other than the holes? A. No.

Q. State whether or not there was anything that might have been a powder burn?

A. Around the bullet holes there was, it was darkened, apparently burnt with powder for about half to three-quarters of an inch surrounding the hole.

Q. Did you notice any other mark on the body that might have been produced by the powder or the flash of the gun or the hot gases? A. No.

Q. When you laid him on the operating-table was he stripped for the purpose? A. Yes.

Q. Did you notice his arms at the time?

A. Not particularly, no, at that time.

Q. Now, Doctor, will you state what, if anything, Mr. Mason himself said to you?

Mr. EICKEMEYER.—That is objected to on the ground and for the reason it was a privileged communication.

Mr. SCALLON.—I will modify the question, if your Honor, please.

Q. Regarding the manner in which he was shot. [59]

Mr. EICKEMEYER.—That is objected to.

The COURT.—Let him state his question.

Q. And who had done the shooting?

A. I asked Mr. Mason, "Who did this?" As I recall his words, he said, "I did it myself; I shot myself twice."

Q. Now, where did this conversation take place?

A. In his room at his house.

(Testimony of Dr. Richard B. Durnin.)

Q. How long after you had got there?

A. Well, within five minutes.

Q. Now, who, if anybody, accompanied you on your way to the hospital?

A. Oscar Frederickson—pardon me, I didn't understand the question.

Q. Who accompanied you? Did anybody go with you in the car to the hospital? A. Yes.

Q. Who? A. Mrs. Mason.

Q. Whose car was it? A. My car.

Q. Now, what, if anything, was said by Mrs. Mason at that time on the way to the hospital?

A. Mrs. Mason, as I recall, told me about Mr. Mason coming home from work and that he wasn't feeling very well and that she—

A. (Continued.) —that she said to him, "If you don't feel like going to work, don't go to work."

Q. Proceed, Doctor, and state fully.

A. Yes, I was just—it isn't fresh in my memory, you know. She also remarked that she knew of no reason why he should have done this.

Q. What, if any, other statements of his, did she repeat to you, or purport to repeat to you, regarding his health and his feelings.

A. Yes; she said, "It is a pretty hard thing for a man not feeling any better than I do," or words to that effect, "having to work."

Q. Well, can you recall the exact words which she used? A. No, I cannot. [60]

The COURT.—Is this what he said to you?

(Testimony of Dr. Richard B. Durnin.)

A. No, this is what she said to me on the way to the hospital.

Q. Now, what, if anything else, did she say?

A. I cannot recall.

Q. As to how it happened?

A. Yes; she spoke of a note that she found; now, where she stated that note was found, I didn't pay very much attention.

Q. A note by whom, from whom?

A. A note written by Mr. Mason that afternoon; whether it was before or after he had been shot I would not say.

Q. Did she state anything regarding the contents of the note? A. I do not recall that she did.

Q. Doctor, from your observations of Mr. Mason, can you say whether he would have been able to write a note after being shot? A. Yes.

Q. How much strength did he have left when you found him?

A. He had not a great deal of strength left, but he had strength enough left to answer questions intelligently; he did not appear very anxious to talk, naturally, a man in his condition would not. From what I had been told regarding him being found in the basement and being helped up by his wife to the room, I should say he would be perfectly able to write a note.

Q. Now, who had told you this?

A. Mrs. Mason brought that part out at the examination at the inquest; she did not tell me, to my knowledge, that she helped him upstairs.

(Testimony of Dr. Richard B. Durnin.)

Q. It was later that you heard her say that?

A. Yes.

Q. But I am speaking now about the time of the occurrence itself.

A. She did not tell me then that she had helped him up.

Q. What, if anything, did anybody say in her hearing about the place where the shooting occurred, at the time that you were at the house?

A. Mrs. Mason and I were not in the room at all the time together during the time I was at the house; she was in the front room when I was in with Mr. Mason alone, and I believe that she was with Mr. Mason [61] alone when I was in the front room.

Q. What I am trying to get at was whether any explanation of the occurrence was given to you at that time in her hearing?

A. No, there was nothing definite; if it was said it would probably be said to Oscar Frederickson, and I wasn't paying attention to it, I was paying attention to the patient.

Q. How was Mr. Mason's mind? A. Clear.

Cross-examination.

Mr. JUDSON. — Q. Doctor, what was Mrs. Mason's condition at that time that you saw her up there and the time you were talking to her?

A. Well, when I came to the door Mrs. Mason was crying, seemed nervous and upset, naturally.

Q. Was she nearly hysterical?

A. Well, she had pretty good use of her mental faculties; she was very nervous; she did not throw any

(Testimony of Dr. Richard B. Durnin.)

fits or anything of that nature, still she was quite nervous.

Q. Now, Doctor, when you were at the house and when you were going from the house to the hospital, your mind was on the patient, was it not?

A. Yes, sir.

Q. Your patient; and you did not pay any very particular attention to what may have been said by anyone else?

A. No; another thing, it was a very short trip.

Q. You were driving the car about as fast as you could drive a trip like that? A. Yes, sir.

Q. Now, was Mr. Mason a pretty sick man at the time you saw him, first saw him? A. Yes, sir.

Q. Could you tell how long before that he had received these wounds, Doctor?

A. I would say from the complete observation of the case, from the time that I had seen him up till the time that he was operated on, that [62] it would not be over 15 minutes to half an hour.

Q. But you would be unable to say—that is from the time you first saw him, you mean? A. Yes.

Q. But as to that you are not positive, of course?

A. Because from the fact that a hemorrhage of the spleen they don't last very long.

Q. At the time you were at the inquest, Doctor, you did not make any statements in regard to anything you claim Mrs. Mason had said to you while you were in the car? A. I do not recall.

Q. Your memory at that time of course would be fresher than at any other time, wasn't it?

(Testimony of Dr. Richard B. Durnin.)

A. Yes, sir.

Redirect Examination.

Mr. SCALLON.—Q. You say you do not recall what was said at the inquest?

A. I do not recall what was said; I do not recall whether I said anything regarding Mrs. Mason's conversation with me to the hospital.

Q. But whether you were asked anything about it—

A. If I had been asked about it I made the statement.

Q. And if you weren't asked, you did not?

A. If I weren't asked I did not make the statement.

[63]

Testimony of J. B. Clark, for Defendant.

J. B. CLARK, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him testified, in substance, as follows:

Direct Examination.

Mr. SCALLON.—My full name is J. B. Clark. I am connected with the Postal Telegraph and Cable Company at Great Falls. I have been with them since the second of February, 1916. I have been subpoenaed to bring with me the original of a telegram and I have it with me.

(Witness produces telegram which is marked Exhibit No. 1, Deft.)

By our record it indicates that one of our messengers delivered it to the Telegraph Company. I made

(Testimony of J. A. Curry.)

a charge to J. A. Curry for it in pursuance of directions on the face of the telegram.

(No cross-examination.) [64]

Testimony of J. A. Curry, for Defendant.

J. A. CURRY, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him testified as follows:

Direct Examination.

Mr. SCALLON.—Q. Mr. Curry, state your full name.

A. John A. Curry.

Q. Your business.

A. I am city editor of the "Tribune."

Q. City editor of the "Tribune"? A. Yes, sir.

Q. How long have you been at that capacity?

A. Just about nine years.

Q. Do you know the plaintiff here—Mrs. Mason?

A. Yes, sir.

Q. How long have you known her?

A. I think about seven or eight years, six or seven,—I don't know just exactly how long.

Q. Where? A. In Great Falls.

Q. Did you know Mr. Mason? A. Yes, sir.

Q. How long had you know him?

A. Just about the length of time I have been in the city.

Q. Were you a visitor at their house?

A. Yes, sir.

Q. State that nature of your relations; were they friendly or not, close or not.

(Testimony of J. A. Curry.)

A. Well, yes, I would say so; I ate at the Café, where he was manager, every night for some eight years and a half, that is while he was there; of course he wasn't there all that time; he was away for a couple or three years, but he was manager at the time that I came.

Q. Now, will you state what you had to do with the sending of the paper marked for identification Exhibit No. 1 for defendant?

A. Well, I don't know that I would say I had anything, but sending it for the defendant (plaintiff); I wrote it and sent it and paid for it. [65]

Q. You wrote it and sent and paid for it?

A. Yes, sir.

Q. By whose direction?

A. I did it on my own direction as a friend of the deceased.

Q. From whom did you get the information?

A. I got the information—I happened to know—

Mr. JUDSON.—What information?

Q. The information upon which this telegram is based.

A. The information on which the telegram was based was largely street information that I got before I went to the hospital.

Q. Then did you go to the hospital?

A. Yes, I was to the hospital, I was called to the hospital, by, I take it, the telephone porter there.

Q. Did you see Mrs. Mason there?

A. Yes, I saw Mrs. Mason.

Q. Did you speak with her?

(Testimony of J. A. Curry.)

A. Well, in so far as talking with a hysterical woman is concerned, yes.

Q. Well, did you speak with her?

A. I say I did.

Q. Did you know the person to whom this was addressed?

A. I had not met that person until afterwards; I knew the person's name from having talked with Mr. Mason about his sister.

Q. Well, do you pretend to say, Mr. Curry, that you undertook to send this telegram, with the name that is signed to it, without having talked to Mrs. Mason about it?

A. I am not making any pretense about it. I told you how it happened.

Q. You felt authorized by her to send this telegram?

A. I can't say that I felt authorized by her; I felt interested in the family and I sent the telegram and I paid for it.

Q. Did you tell her about it? [66]

A. I don't know that I did tell her about it on that particular day.

Q. Later, did you tell her about it?

A. Well, I think likely that when I got a telegram in answer to that, that I handed it to her.

Q. Who was referred to here by the name which was used in this telegram?

A. I know the name. The name is intended to refer to Mrs. Mason.

Q. To Mrs. Mason or Mr. Mason?

(Testimony of J. A. Curry.)

A. Which one?

Q. First one.

A. The first one is intended to refer to Mr.Mason.

Q. And the name that was signed?

A. That is intended to refer to Mrs. Mason.

Q. Do I understand that this was sent after you had seen Mrs. Mason that night, after you had been to the hospital?

A. Yes. I wouldn't say just the time; I would say some time about 8 o'clock.

Q. And you had been up to the hospital when?

A. I think I was at the hospital about—I don't know for certain—some time between five and six or between five and six-thirty.

Q. And you sent it about eight?

A. Well, the telegram is the best evidence as to when I sent it.

Q. Well, you might look at it.

A. I don't know that I would know their marks. You know as much about telegrams as I do. You know they carry their own marks. I don't know if it shows here or not; I don't think there is anything that shows.

Q. You think it was about eight, do you?

A. Well, I have told you it was after I was at the hospital. I don't know just what hour it was sent.

Q. And what relation, if any, to the deceased was the person to [67] whom it was sent?

A. A sister. That, however, I should qualify as the name that he gave me of his sister. I talked with

(Testimony of J. A. Curry.)

him about his sister before his death. I assume it is his sister.

Q. Well, did you have any talk at all with Mrs. Mason?

A. I have answered that question, also, by telling you that in so far as talking with a hysterical woman would be called a conversation.

Q. That is giving your opinion, but as to the fact as to whether you spoke to her and she spoke to you.

A. Naturally that occurred; yes.

Q. You did have a talk, then; you talked to her and she talked to you?

A. With the qualification, as I said.

Q. With or without a qualification, you did talk, did you? A. I said that we did.

Q. What was said?

A. About the only intelligent thing I got from her when I got to the hospital was that George was dead; and I found from some one of the nurses, I don't know which one—

Q. I am speaking about Mrs. Mason; what was said by her? A. I have told you.

Q. Have you told me all?

A. Yes, sir; I think all that I could swear to.

Q. You mean by that, all that you remember or what?

A. All that I remember of intelligent conversation, yes.

Q. How long were you at the hospital?

A. Possibly ten or fifteen minutes, maybe not to exceed eight; very short time.

(Testimony of J. A. Curry.)

Q. Did you leave her there, or go with her?

A. I think that Mrs. Mason rode away from the hospital in the same automobile that I was in.

Q. And where did you go to? [68]

A. I went back to the office; she went to the place where she stayed,—I don't remember, I think some place on the south side; I think Mrs. Barnhart was with her also.

Q. Was she in the car with you when you went by your office? Did you get off first? Did you get off first, or did she?

A. She got out at the place where she stopped and I rode in the front seat with the driver, and she and Mrs. Barnhart rode in the back seat.

Q. What, if anything was said to her by you regarding your intention to send this telegram?

A. I don't think I said anything to her about sending the telegram. I got some information concerning George's relatives of whom I knew, and I asked her at the time what the address was and she gave it to me. I knew the name.

Q. Now, did you get from third persons or from her the words to which I point in the second sentence in the telegram?

A. That, as I told you, was a street rumor down town.

Q. You say that was rumor,—these words to which I point?

Mr. JUDSON.—Object to that as having been already answered.

The COURT.—The objection will be sustained.

(Testimony of J. A. Curry.)

His answer to that is sufficient, it seems, to the Court.

Q. Well, about the third sentence in the telegram.

A. The third sentence?

(Counsel for plaintiff objects; objection overruled.)

A. The third sentence to which you point is an assumption from the second one.

Q. Is not that assumption, if assumption it be, then based on something that she had said?

A. I don't think so.

Q. Well, please read it again.

A. Well, I have read it twice. No, sir, I don't think so. I have told you two or three times that I wrote this at my office on my own initiative, and that, as I say, naturally follows out of the other; if the first was true the second is a natural consequence. [69]

Q. Yes, I know all of that.

A. And the third one, you might go ahead, the final one is also.

Q. But what I want to get at is whether you wrote, for instance, the third sentence or the last sentence there? The fourth one has not been answered,—a mere assumption and without having talked about these matters with Mrs. Mason?

A. The fourth sentence, as you will recall, is a matter of inquiry, or substantially that, that Mrs. Mason—it wouldn't be necessary to ask Mrs. Mason for any information concerning that.

Q. What about the third sentence?

Mr. JUDSON.—I object to that as already answered.

(Testimony of J. A. Curry.)

The COURT.—Objection sustained.

Mr. SCALLON.—We save an exception to that, if your Honor please.

Q. What was it that you told Mrs. Mason of having sent this telegram?

A. In answer to that a while ago, I said that it was possibly the next day; I think likely it was.

Q. Did you tell her the contents of it at that time?

A. No, sir; because I didn't have any copy of the contents of it, and it was at the telegraph office.

Q. Regardless of your reason of your having a copy, did you purport to state to her the contents?

A. No, sir; I did not; I told her I had sent a telegram.

Q. To— A. Mrs. Benson.

Mr. SCALLON.—I will show this telegram to the Court, if your Honor please.

Q. Do I understand that you were acting in the capacity as a friend of the parties in sending this?

Mr. JUDSON.—I object to that as having been already answered and gone into. [70]

Mr. SCALLON.—This witness is, as we submit, decidedly an unwilling witness.

The COURT.—I don't know; it seems to me he has answered freely, but does not answer what you would like.

Mr. SCALLON.—Yes, he has answered freely, that's all. I submit the telegram to the Court.

The COURT.—I see nothing in it, except what he says, a subject of street rumor.

Q. Mr. Curry, you referred to a lady by the name

(Testimony of J. A. Curry.)

of Barnhart. A. Yes, sir.

Q. Do I understand you to say she was at the hospital when you went up there?

A. I didn't say she was at the hosuital; I said she came away; I don't know whether she was there when I got there or not.

Q. But if she came away from there—

A. Yes, she came away from there in the same car that I did. She was there when I was there, but I understood you asked if she was there when I got there.

Q. No, whether you saw her there.

A. Yes, she was at the hospital there.

Q. In whose company was she? With whom was she?

A. When I saw her she was going out of the hospital with Mrs. Mason; she was around the hospital some place; I don't know where, when I first got there.

Q. Were they both coming out when you first saw Mrs. Barnhart?

A. When I first saw Mrs. Barnhart, yes.

Mr. SCALLON.—We will offer this exhibit I in evidence.

Mr. JUDSON.—Objected to as incompetent, irrelevant and immaterial and not connected with this.

The COURT.—Objection will be sustained.

Mr. SCALLON.—We save an exception.

(No cross-examination.) [71]

(Testimony of J. A. Curry.)

The said telegram was in words and figures as follows, to wit:

53 N. L.

Send NIGHT LETTER PAID and Charge to John A. Curry Personally.

May 6, 1919.

Mrs. Fred T. Benson,
8 West Oak Street,
Chicago, Illinois.

Otto died this afternoon of gunshot wounds self inflicted. The poor boy had been in fair health following return home until to-day when he suddenly grew despondent and committed the rash act. It is a terrible strain, but will strive to meet it bravely for Fern's sake. Wire me if you are coming.

MAE.

Charge this to John A. Curry. [72]

Testimony of John C. Morrison, for Defendant.

JOHN C. MORRISON, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him testified as follows:

Direct Examination.

Mr. SCALLON.—Q. Mr. Morrison, what is your given, your full name? A. John C. Morrison.

Q. You live here in Great Falls? A. Yes, sir.

Q. What is your business?

A. Undertaking business.

Q. You may state whether or not you conducted the funeral of the late George Mason? A. Yes, sir.

Q. Do you know what became of the clothing he

(Testimony of John C. Morrison.)

had on him at the time he was taken from the hospital? A. I have them here with me.

Q. Have you got them all?

A. All except the underwear.

Q. Do you know what became of the underwear, of your own knowledge?

A. Well, as far as I can recollect, from what I know of our men who took—I am not sure whether he took the underwear off the body when it was taken to the preparation-room, or whether it remained with the body, but I think the underwear was there until the inquest, and I have always instructed them to take care of everything belonging to a body of a suicide until after the inquest was over, and I don't remember whether I told him it was necessary to keep it until after the inquest was over or not, and I never thought anything more about it, and, anyway, he put the clothes down in the vault room of our basement, and several weeks after that the agent of the New York Life Insurance Company—

Q. Have you found them now?

A. I found them except the underwear.

Q. Do you know what has become of the underwear?

A. I think it was destroyed; I am not sure. He could probably tell you about that. [73]

Q. Your man could? A. Yes, he is here now.

Q. Have you got the shirt? A. Yes.

Q. The outer shirt? A. Yes, sir.

Q. Will you please produce that? (The witness produces it.) That is the shirt, is it? A. Yes, sir.

(Testimony of John C. Morrison.)

Mr. SCALLON.—We offer this in evidence.

The COURT.—For what purpose?

Mr. SCALLON.—So that the jurors may see for themselves whether there is any perforation in it or not and where.

(The shirt was admitted in evidence.)

Q. What else have you got there?

A. Here is a piece of flannel that was taken off the body, and stockings and trousers. Of course, I couldn't swear to these being the clothes; these were the clothes given to me by our men; I didn't see the clothes taken off the body; I told him to get the clothes for me, and he could probably swear to the identity of them.

(No cross-examination.) [74]

Testimony of Henry D. Dunham, for Defendant.

HENRY D. DUNHAM, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him testified as follows:

Direct Examination.

Mr. SCALLON.—Q. State your full name.

A. Henry D. Dunham.

Q. You are employed where?

A. W. H. George Company.

Q. By this gentleman who was just on the stand?

A. W. H. George Company. His name is Mr. Morrison; he is the manager.

Q. Did you have anything to do with preparing the body of Mr. George Mason for funeral? A. I did.

Q. Who removed the clothing from his body?

(Testimony of Henry D. Dunham.)

A. When I went up to the hospital to get him, I can't swear to whether his clothing was on him yet or not, but anyway we took the clothing with him from the hospital, down from the place where they take the clothing off him at the hospital or not I can't just remember.

Q. Do you know what has become of the underclothes? A. I do not.

Q. They are not around the establishment, as far as you know?

A. No, as far as I know they are not.

(No cross-examination.) [75]

Testimony of Mrs. Catherine Clark, for Defendant.

Mrs. CATHERINE CLARK, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to her testified as follows:

Direct Examination.

Mr. MADDOX.—Q. Mrs. Clark, what business were you engaged in in May, 1919?

A. I was bookkeeper for H. B. Lake & Company.

Q. Did you know George Mason personally?

A. I met him in a business way, several times in Mr. Lake's office.

Q. Do you remember any business transaction with him about noon or in the afternoon of May 6, 1919?

A. Was that the day Mr. Mason was killed?

Q. Yes. A. I do.

Q. When did you see Mr. Mason on that day?

A. Mr. Mason came in the office some time either shortly before noon or shortly after one, I don't re-

(Testimony of Mrs. Catherine Clark.)

member which, and asked for his balance in the firm; he had a credit balance.

Q. Then did you give him his balance at that time?

A. Mr. Lake was not in at the time and therefore I couldn't—

Mr. JUDSON.—I object to that as not being responsive to the question. She can answer that yes or no.

Q. You didn't give him his balance at the time of his first visit? A. No.

The COURT.—Where was this now?

Mr. MADDOX.—In the office of H. B. Lake & Company.

Q. Later did you give him his balance?

A. Yes.

Q. He came in a second time, as I understand it?

A. Yes.

Q. Who signs checks for H. B. Lake & Company?

A. Mr. Lake signed it and I countersigned it at that time.

Q. I will have you look at Exhibit 3 and state whether that is the check which you gave him on that occasion. [76]

A. That is the check I gave him.

Q. Now, what was his appearance at that time, Mrs. Clark?

A. I don't remember anything about his appearance any other than at any other time.

Q. He wanted his balance though, I understand you? A. He asked for his balance.

(Testimony of Mrs. Catherine Clark.)

Q. And at that time was Mr. Lake himself in the office? A. No.

Q. He didn't come in until afterwards?

A. Until after.

Q. Then Mr. Lake's signature on the check was placed on it some time after you had signed it?

A. Yes.

Q. Then he came back for it and you turned it over to him? A. Yes.

Q. That was about one o'clock on the 6th day of May, 1919?

A. The second time he came back was about two, I think, between one and three.

Mr. MADDOX.—We offer this exhibit in evidence.

(Received in evidence over the objection of counsel for plaintiff.) [77]

Testimony of Dr. Lee Roy McBurney, for Defendant.

Dr. LEE ROY McBURNEY, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him testified as follows:

Redirect Examination.

Mr. SCALLON.—Q. Please state your full name, Doctor. A. Dr. L. R. McBurney.

Q. You live here in Great Falls? A. Yes, sir.

Q. You are a practicing physician? A. Yes, sir.

Q. You are also coroner of the county?

A. Yes, sir.

Q. And were in May of this year? A. Yes, sir.

Q. State whether or not you held an inquest over the remains of Mr. George Mason. A. I did.

(Testimony of Dr. Lee Roy McBurney.)

Q. In the month of May of this year?

A. I did so.

Q. As coroner state whether or not any pistol came into your possession in connection with the case.

A. It did.

Q. From whom did you get it?

A. I believe Dr. Durnin had it at the hospital and I notified him to bring it to the inquest, and it was at the inquest; I am not sure whether Dr. Durnin brought it or Sheriff Burns brought it.

Q. It was produced at the inquest? A. Yes, sir.

Q. Was Mrs. Mason present there when it was produced? A. Yes, sir.

Q. And what became of it afterwards?

A. I have it in my possession now.

Q. Have you always had it?

A. I had it except a short time ago I let Sheriff Burns have it.

Q. When was that?

A. A week ago Saturday, I believe; I don't remember just the date. When was it, Mr. Judson?

[78]

Mr. JUDSON.—I think that is correct.

Q. Did you have any interview with anybody representing the defendant about the gun at that time?

A. Did I have any what?

Q. Any interview with anybody representing the plaintiff at that time?

A. Well, only that Mr. Judson said that he would like to examine the gun and I let him examine it at the time. He said he would like to take it to the

(Testimony of Dr. Lee Roy McBurney.)

home of Mrs. Mason, and I told him that, as I had been subpoenaed, I wouldn't let him have it, but I would turn it over to Sheriff Burns, if he wished to accompany Mr. Judson to the home, and I turned it over to Sheriff Burns and got it from him this morning.

Q. You had been subpoenaed at the time?

A. Yes, sir.

Q. Have you got a record of the number of the gun?

A. There is a record in the proceedings of the inquest.

Q. Has the gun been used since it came into your possession first? A. Yes, sir.

Q. For what purpose?

A. I had it with me several times on trips out in the country and I took occasion to shoot it at that time.

Q. Have you any knowledge of what, if anything, was done with it by Sheriff Burns? A. No, sir.

Mr. JUDSON.—I object, incompetent, irrelevant and immaterial.

The COURT.—I cannot see that it serves any purpose. Do you want this gun introduced?

Mr. SCALLON.—I want to trace possession of the gun, inasmuch as it has not always been in possession of the proper officer we do not wish to introduce it ourselves, and I am explaining that.

(No cross examination.) [79]

Testimony of George Harper, for Defendant.

GEORGE HARPER, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him testified as follows:

Direct Examination.

Mr. SCALLON.—Q. State your full name, Mr. Harper. A. George Harper.

Q. What is your position in this county?

A. Clerk of the District Court.

Q. Have you got with you the record of the inquest in the matter of George Mason, deceased?

A. I have.

Q. Will you please show them? (Produced and marked Exhibits 4 and 5.) I notice that an envelope fell out of it. Was that a part of it?

A. That is an exhibit. There's two of those exhibits, one is on the front page and one on the last page of the inquest.

Q. Is this the one you mean?

A. Yes, that is the other one; they are a part of the inquest as originally filed by the coroner. [80]

Testimony of Peter Silk, for Defendant.

PETER SILK, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him testified as follows:

Direct Examination.

Mr. SCALLON.—Q. State your full name, Mr. Silk. A. Peter Silk.

Q. Your business? A. Court reporter.

(Testimony of Peter Silk.)

Q. State whether you were present at the inquest over the remains of George Mason? A. I was.

Q. Did you report the testimony? A. Yes, sir.

Q. I show you here a paper attached to that report and marked, Exhibit 1, and I ask you, not to read it, but tell me whether that was produced at the inquest.

A. It was.

Q. You say it was produced? A. Yes, sir.

Q. By whom?

A. Well, I don't recall now, Mr. Scallon, as to whether it was by the coroner or not.

Q. Can you refer to your report and tell us by whom it was produced?

A. I wouldn't be sure. It may have been introduced by Mr. Ewald, Deputy County Attorney, who was present that night at the hearing.

Q. It was produced by whom, you say?

A. I say it may have been produced by Mr. Ewald, Deputy County Attorney, present at the hearing that evening.

Q. Mr. Ewald was Assistant County Attorney?

A. Yes, sir.

Q. Will you look at your report and tell us whether or not any question was put to Mrs. Evelyn Mason, the plaintiff here, regarding this envelope?

A. Yes, sir.

Q. Now, I will ask you what was asked her about this envelope and what she said in reply. [81]

A. First question pertaining to the envelope:

"Q. Where was the money?

(Testimony of Peter Silk.)

"A. It was in an envelope sitting on the bed—on the spring.

"Q. Was this the envelope the money was in?

"A. Yes, that is the one.

"Q. Was it all sealed up?

"A. No, the end was off; it was not sealed."

Q. Now, will you look at page 38, what question was put to her there about this envelope?

A. "Q. This envelope, you say, was on the bed?

"A. It was sitting propped up."

Q. What, if anything, did he say about who wrote the words on this envelope? Will you look on page 33, simply the sentence in which anything may have been said about the envelope, if any?

A. This is part of an answer:

"He said he had some money in his pocket and he took a pencil and wrote on an envelope on the floor and he says, 'You have another dividend in the Anaconda coming.'"

Q. Now, on that same page, look down below, after the question and answer you have already read relating to the envelope, state what was said about money in it.

A. "Q. Was this the envelope the money was in?

Q. Yes, you have already read that; then you read down there to and including the answer, "No, the end was off; it was not sealed." Following that what was said?

A. "Q. It was in bills, was it?

"A. Yes.

(Testimony of Peter Silk.)

"Q. $25, he said?

"A. No, $745 in there and a $25 dividend I think. The Anaconda has not paid the last dividend. I think that is the way."

Mr. SCALLON.—We offer this envelope, Exhibit 3, in evidence—or rather Exhibit 1 of the coroner's inquest.

(Marked Exhibit 6—Defendant.) [82]

Mr. JUDSON.—Objected to, irrelevant, incompetent, immaterial, illustrating no issue in this case, no proper foundation laid.

The COURT.—Objection overruled; it may be introduced. I don't see why it is not detached.

Mr. SCALLON.—With your Honor's permission I will take it off.

The COURT.—You can, without mutilating anything and it can be replaced later.

Mr. SCALLON.—Here is the envelope with words on it as follows: "May, there is still a dividend coming from Anaconda." I would like to ask that the jurors inspect the envelope if your Honor please. (Handed to jurors.)

Mr. SCALLON.—I will read this check, if your Honor please, that was admitted in evidence: This check is of H. B. Lake & Co., 433–35 Ford Building. Great Falls Montana, May 6, 1919. 4061. Great Falls National Bank, Montana, pay to the order of George Mason $713.19. H. B. Lake & Company. Underneath, H. B. Lake; in printing and writing. Endorsed George Mason.

(Testimony of Peter Silk.)

(By leave of Court the original check has been withdrawn and a copy substituted. It was stamped by perforation "paid 5–6–19.")

Cross-examination.

Mr. JUDSON.—Q. Mr. Silk, in this same conversation did Mrs. Mason make other statements there at that time?

A. I don't quite understand you.

Q. In this same conversation in which she stated these statements that you have related on the stand, did she make other statements there at that time?

A. Yes, I presume, there is the examination there in the record.

(Defendant rests.) [83]

PLAINTIFF'S CASE.

Testimony of Charles G. Crago, for Plaintiff.

CHARLES G. CRAGO, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him testified, in substance, as follows:

Direct Examination.

Mr. JUDSON.—My name is Charles G. Crago. I am assistant foreman at the "Tribune." I have held that position for 15 or 20 years. I was acquainted with George Mason in his lifetime. I usually saw him twice every night.

Q. How did you come to see him twice every night?

A. Well, I eat at the Gerald Café and that is where he was manager.

Q. What have you to say as to whether or not he

(Testimony of Charles G. Crago.)

was, prior to the day of his death and on that day, of a cheerful or pleasant disposition?

A. He was very cheerful, especially toward the last, after he came back from California.

Q. What were his family relations?

A. I don't know; he always spoke well of his family and his child.

Q. Now, did you see him on the day of his death?

A. That morning; yes.

Q. You may state whether or not he seemed the same as usual, usual good spirits?

A. He seemed about the same.

(No cross-examination.) [84]

Testimony of Oscar L. Frederickson, for Plaintiff.

OSCAR L. FREDERICKSON, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him testified in substance as follows:

Direct Examination.

Mr. JUDSON.—My name is Oscar L. Frederickson. I am a waiter at the Gerald. I was a waiter for them for seven years once and I left for two years and am back there three now. I was acquainted with George Mason in his lifetime. I worked most of the shifts with him. I worked on the shift with him the last few months and the last month prior to his death. He had a good disposition. On the day of his death and prior to that time he was very cheerful, always spoke well and always attended to his duty, always on the job all the time. His disposition was good;

(Testimony of Oscar L. Frederickson.)

good appearance always; cheerful. He was always steady. He was always in love with his family all the time. I often saw his wife and child at the restaurant. He went to meet them every time they came in. They were in quite regular right along, the lady and the girl. The last time I saw Mrs. Mason and the little girl in the restaurant was very close to his death. I can't say it was the night before or two or three nights before. Their relations at that time were very good. He earned good wages there. I think he owned his own home. He had a little girl about three or four years old.

Cross-examination.

Mr. SCALLON.—Q. Was he ill when he went to California?

Q. Had he been absent? A. He had.

Q. Sometime this year?

A. Up to the time he died?

Q. Yes, right before that time? A. Yes, sir.

Q. When had he been absent?

A. A short time up to his death.

Q. How long before?

A. I should judge it was—he had been working then about [85] 10 or 11 days, just came back from his trip from California.

Q. He came back from a trip to California?

A. Yes, sir.

Q. And went to work, as I understand?

A. Yes, sir.

Q. And had been working ten or twelve days?

A. I think it was close to ten or twelve days.

(Testimony of Oscar L. Frederickson.)

Q. Approximately, when he died? A. Yes.

Q. What was his condition when he left for California? A. He wasn't feeling very well.

Q. Do you know anything about his being sick after he came back?

A. He said he was getting better right along.

Q. What more did he say?

A. He said he was feeling better every night that I left him, he said he was feeling better.

Q. Is that all he said?

A. That is all I can say to my knowledge.

Q. Now, I ask you, however, if he had any sickness or any spell or attack of any kind after he returned from California? A. No.

Q. You haven't told me about that.

A. No, he did not.

Q. You were a witness before the coroner's jury?

A. I was.

Q. I will ask you whether you did not say this? "When he came back from his trip he said he was sleeping better and he said he was feeling better all the time; in another week he said he would be feeling all right." A. Yes.

Q. Did you testify that way? A. I believe I did.

Q. Was that correct? A. Yes, sir. [86]

Q. So he wasn't quite all right according to that?

A. Well, he said he was feeling better every night I left him, he said he was feeling better; he was in very good spirits when I left him that morning. I think it was close to ten or eleven or twelve days, something like that, that he worked at the restaurant

(Testimony of Oscar L. Frederickson.)

after his return from California. I think he put in a week anyhow. Oh, yes, I think he put in more than one day. I think he was off one or two days before he went to work upon his return.

Redirect Examination.

Mr. JUDSON.—Q. What was the matter with him at that time, if you know?

A. He ate something and I ate the same thing, and he got sick and I didn't; he broke down.

Q. He had ptomaine poisoning, something like that?

A. I can't say what was the matter with him; we both ate together and both ate the same thing.

Q. Did he about the time Mr. Scallon was asking about him say anything about buying some more property in town?

Mr. SCALLON.—Objected to as immaterial and irrelevant and also as self-serving.

The COURT.—No, I think not under the circumstances; he has asked for circumstances covering the same period. I think he may state any others that he knows that might bear an inference of expectation of continued life, if it bears such. For the jury; the objection will be overruled.

Mr. SCALLON.—Save an exception.

Q. What did he say, Mr. Frederickson, about that, if anything? A. In regards to what?

Q. In regards to buying any other property in town or selling anything he had.

A. He said he was going to sell his stocks he had

(Testimony of Oscar L. Frederickson.)

and was going to buy city property with his money from now on. [87]

Q. When did he make that statement to you?

A. After he come back from California.

Q. Would that be just a few days prior to his death?

A. Yes, very close; you see he was only back a short while.

Q. Did he say anything about building a new home?

A. He said he might sell the old home and build a home closer in on account of his wife didn't want to stay out there alone, it was too far out.

Q. That was just a few days before his death, did you say? A. Yes, sir.

Q. Do you know anything about him purchasing a gun? A. I do.

Q. Did you hear anyone ask him to purchase a gun? A. I did. He has told me.

Mr. SCALLON.—Objected to as immaterial and irrelevant and also as incompetent, if your Honor please.

The COURT.—As the Court has said before, it may furnish a circumstance. If there is any room for inference that he bought the gun for suicidal purposes I think it would be permitted to show that he bought it for other purposes. The objection will be overruled.

Mr. SCALLON.—Save an exception.

A. Well, I heard Mrs. Mason say one time, "George, you will have to get me a gun if you want

(Testimony of Oscar L. Frederickson.)

me to stay out at that house."

Q. When was that you heard her say this to him?

A. Close to the time of his death, after he came back from California.

Q. Where was she at the time?

A. In the Gerald Café.

Q. And who was with them, if anyone?

A. Baby and I and George.

Q. What was she doing in there at that time?

A. Eating. [88]

Q. That was a day or two before his death?

A. Yes, sir.

Q. Was there any reason for him, particular reason for him purchasing a gun stated at that time?

A. Well, he stated before to me that he would have to get a gun.

Q. Why? What was the reason, if any reason was stated?

A. Because his wife did not like to stay in the house alone unless she had a gun.

Q. Had there been anything happen at the house that would cause him, that you know of—?

A. Well, there was some people tried to break in the house at the time they was away to California.

Mr. SCALLON.—Move to strike that out as incompetent, irrelevant,—statement of the house.

The COURT.—Motion will be denied.

Mr. SCALLON.—Save an exception.

Recross-examination.

Mr. SCALLON.—Q. Mr. Frederickson, you referred, in answer to Mr. Judson, to a time when Mr.

(Testimony of Oscar L. Frederickson.)

Mason had eaten something which made him sick.

A. Yes, sir.

Q. Didn't he have stomach trouble?

A. Not up to the time we ate, at that time he did not; he was always in good health.

Q. I will ask you if you testified as follows before the coroner's jury:

"Q. Did he complain to you before he went on his trip about feeling bad?

"A. No, he said he was not feeling well.

"Q. Did he say anything as to what his trouble was?

"A. No, he said he couldn't hold nothing on his stomach.

"Q. He appeared to have stomach trouble, did he? [89]

"A. Well, at the time it was stomach trouble and weakness.

"Q. Where? Weakness of his body, you mean? A. No.

"Q. Weakness of his stomach?

"A. It seemed like he broke right down; he had been working awfully hard, I will say that; it seemed like he broke down. When he came back he said he was feeling fine and getting along better; he said in another week he would feel fine."

Q. Did you so testify?

A. I testified very closely to that, if I remember right.

Q. Well, is that correct?

(Testimony of Oscar L. Frederickson.)

A. I think it is. I remember him saying he had stomach trouble, I know that myself, not stomach trouble, but from the bowels, that is where he was suffering from; I remember that distinctly.

Q. How long had that continued?

A. Well, he was sick from the time he laid off and went to California, and he come back and then he said he was feeling better right along.

Q. But previous to that he had been sick and it appeared to you as if he had broken right down?

A. He broke right down; yes, sir.

Redirect Examination.

Mr. JUDSON.—Q. I will ask you to state whether or not that was after this time he seemed to have eaten something that seemed to have poisoned him,—is that the time you mean he broke down?

A. Yes, that is the time he broke down. [90]

Testimony of William Grills, for Plaintiff.

WILLIAM GRILLS, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him testified in substance as follows:

Direct Examination.

Mr. JUDSON.—My name is William Grills. I reside at 217 Central Avenue. I have resided in the city of Great Falls 28 years. I am in the restaurant business. I have been in that business since 1894 or 5. I call my place the Gerald Café. I have run that café about 20 years, I believe, 19 or 20. I was acquainted with George Mason in his lifetime. He

(Testimony of William Grills.)

worked for me. I can't just tell you exactly how many years he worked for me; the first time he worked perhaps a year, might have been two, but then he was away for a year or more, then he has worked for about 4 years since that time, 3½ years. Previous to the time of his death, he worked for me probably 3½ years. He was night manager for me. At the time of his death I paid him as salary fifty dollars a week. He was a very pleasant man, good to the customers. I saw him that morning about, probably, 6:30 or 7:00 when he went off shift. He appeared to feel good at that time. Why, I think he appeared cheerful and happy. I think he seemed to go out of the restaurant feeling as well as a person in health would. As far as I know his family relations were good. They had one child. Yes, I would say I think he seemed to have affection for his child and for his wife. I would say they got along as well as man and wife, and better than perhaps some. I never knew of them or saw them have trouble. He was a steady worker and a good man in his place. He held a responsible position with me. Yes, I was very well satisfied with him, sorry when I lost him.

Cross-examination.

Mr. MADDOX.—I stated that I paid him a salary of $50.00 a week. This salary was usually paid Tuesday morning. I couldn't say except I look at the calendar whether May 6th, 1919, was Tuesday morning. On the morning [91] of that day I relieved him from his duty.

(Testimony of William Grills.)

Q. Yes, sir; and before he left the restaurant did he draw his pay check?

Mr. JUDSON.—I object to that as improper examination, irrelevant, incompetent and immaterial.

Mr. MADDOX.—You touched on the question of salary.

The COURT.—I think he may answer. Objection overruled.

Q. Do you recall, now, Mr. Grills, whether he drew his check that morning?

A. Yes, I think, in fact I am sure he had his check with him. Now, that was on Tuesday morning. He had worked for me the preceding day, Monday night. He commenced Monday night.

Q. Prior to that time when had he last before worked for you in the restaurant in his capacity as night manager?

A. Prior to what time, Mr. Maddox?

Q. Prior to Monday night, May 5th.

A. Well, he had got a week in and one night.

Q. He had a week and one night?

A. Yes, we pay every week over there.

Q. He had worked then the entire preceding week, had he? A. Yes, sir.

Q. And Monday of the next week? A. Yes, sir.

Redirect Examination.

Mr. JUDSON.—I want to ask just one question: Before he had this trouble or poisoning that has been mentioned on the stand here, do you know of him being ill? A. No, sir. [92]

Testimony of Dr. W. H. Barth, for Plaintiff.

Dr. W. H. BARTH, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him testified in substance as follows:

Direct Examination.

Mr. JUDSON.—My name is Wm. H. Barth. I reside in Great Falls. My occupation is dentistry. I have been a dentist since 1899. I have practiced in the city of Great Falls about 19 years. Besides dentistry, I hold an official position for the United States, that of Supervisor of Census for the Second District of Montana. I knew George Mason in his lifetime. I expect I knew him since the time he first came here. Quite frequently I ate at the Gerald Café. He always seemed jovial and very pleasant with me and all customers there, never seemed to have any trouble. I think I saw him the night before his death. At that time he seemed to be in very good spirits; he shook hands with me and said he had returned from a vacation. I am also acquainted with Mrs. Mason. So far as I knew their family relations were pleasant. I took Thanksgiving dinner with them, I think, a year ago. They seemed to be very happy.

Q. What kind of a home did he have, Doctor, as to whether it was a well-appointed home?

Mr. SCALLON.—Objected to as immaterial, irrelevant.

The COURT.—He may answer; objection overruled.

(Testimony of Dr. W. H. Barth.)

Mr. SCALLON.—Save an exception.

A. He had a very pleasant home, everything seemed to be very comfortable.

Q. How was it furnished, Doctor?

A. Furnished very well.

(No cross-examination.) [93]

Testimony of Nick J. Haynes, for Plaintiff.

NICK J. HAYNES, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him testified in substance as follows:

Direct Examination.

Mr. JUDSON.—My name is Nick J. Haynes. My occupation is a cook. I have been a cook about 10 or 11 years. I work at the Gerald Café. I have worked there between ten and eleven years. I worked from four in the afternoon till twelve at night. I was on the shift that the deceased Geo. Mason worked. I have known George Mason about 8 or 10 years. He had a very good disposition. He always seemed very happy. I saw him the night before his death. At that time he appeared very happy. He seemed just the same all the time. As to the relations between himself and his wife as to whether or not they were pleasant and whether or not they showed affection for each other, they were always pleasant when I saw them. He thought the world of his little girl.

(No cross-examination.) [94]

Testimony of Gertrude Clark, for Plaintiff.

GERTRUDE CLARK, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to her testified in substance as follows:

Direct Examination.

Mr. JUDSON.—My name is Gertrude Clark. I reside at my home residence in the city of Great Falls. I have resided there two years. I am cashier at the Gerald Café. I have been cashier at the Gerald Café for two years. I work from five in the afternoon until 1:00 in the morning. I was acquainted with Geo. Mason in his lifetime.

Q. What was his disposition as to whether he always appeared jovial and pleasant?

Mr. SCALLON.—I would like to enter an objection by way of suggestion to counsel that he avoid such leading questions.

Mr. JUDSON.—I don't intend—I was hurrying, I didn't expect to.

Q. You may state what his—I don't know—

The COURT.—Change it and say "In reference to joviality, cheerfulness, pleasantness."

A. Mr. Mason always seemed very pleasant, very good to the customers, always jovial.

I saw him the night before his death, when he went off duty. He seemed in the usual way, very happy. Yes, he appeared to show affection for his wife and child, they seemed very well, always appreciated them coming in, always treated them very well.

(No cross-examination.) [95]

Testimony of John C. David, for Plaintiff.

JOHN C. DAVID, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him testified in substance as follows:

Direct Examination.

Mr. JUDSON.—My name is John C. David. I clerk in the Northern Hardware Company. No, sir, I did not know Geo. Mason. I know to whom you refer as Geo. Mason. I have seen him on the street. I did not see him any place else than on the street that I can remember of. I only saw him in the Northern Hardware Company the day that he came there. At the time I saw him there he asked to be shown a revolver. I showed him one. I showed him a 32-Colt's automatic.

Q. I will show you this gun and ask you to look at that gun and tell me is that gun similar to the one—

A. Yes, that is the same type of a gun; yes, sir.

Q. Did you show Mr. Mason how to operate that gun? A. Yes, sir.

Q. Did he tell you any reason why he was purchasing that gun?

Mr. SCALLON.—We make the same objection to this evidence, if your Honor please.

The COURT.—When was this?

Q. What day was this?

A. I don't remember the date.

The COURT.—About? Was it about near the day of his death?

A. The day of his death; yes.

(Testimony of John C. David.)

The COURT.—I think this would likely come within the rule of self-serving statements; unquestionably if a man was buying a gun intending to use it upon himself he never would say so. I think we will exclude that; objection sustained.

Mr. JUDSON.—Very well.

Q. Did he know how to operate this gun?

A. No.

Q. Did you show him how?

A. I showed him all I knew about it. [96]

Q. Have you handled guns to amount to anything?

A. Not in the automatics; no, sir.

Q. You may state whether or not he appeared to be wholly ignorant as to the operation of the gun which you showed him.

Mr. SCALLON.—Objected to as incompetent, if your Honor please.

The COURT.—I think he may answer that.

Mr. SCALLON.—Note an exception.

A. I should say so; yes.

Cross-examination

Mr. SCALLON.—Q. You say you showed him how to operate it? A. I did; yes.

Q. Let's see, what instructions did you give him about it?

A. Nothing except the loading of it, the filling the magazine and cocking the hammer, which consists in pulling back this slide.

Q. Go through the motions.

A. That cocks the hammer and there is the cartridge in the chamber which makes it all ready to

(Testimony of John C. David.)

shoot unless the safety is one. This is the safety here, and when that is pulled down this way and the finger and your thumb is pressed together the gun explodes. (Witness went through the motions.)

Q. Yes, and you showed him the way you indicated to me, did you? A. Yes, sir.

Q. To do like this? (Indicating.)

A. Yes, that is the way it has to be loaded.

Q. And that is the way you showed him?

A. Yes.

The COURT.—Did you say you sold him one?

A. I sold him the gun; yes, sir.

Q. I don't remember whether the witness stated the caliber.

A. 32-caliber. It was a Colt's automatic make. We have a record of the number over there. [97] We have to have a permit. I think I have the number with me. (Refers to memorandum.) Number 248103. I was a witness at the coroner's inquest. I don't remember of ever giving the number there. I wasn't asked, if I remember right.

Q. Well, I will read you a question here and an answer from the report of the inquest, in your examination:

"Q. Do you recognize this gun?"

"A. Yes; of course I can't tell except by the number, the serial number, but that is the same kind of gun, 32-caliber."

"Q. That is the gun, 248743, is it?"

"A. I have it on record; I don't remember the gun."

(Testimony of John C. David.)

A blank was filled in by another clerk over there; when Mr. Mason came back after getting a permit another clerk wrapped up the gun with a box of shells for him. I was waiting on another customer at the time. That is the number that is on record, the one I have in my pocket. [98]

Testimony of Mrs. Evelyn Mason, in Her Own Behalf.

Mrs. EVELYN MASON, the plaintiff, called and sworn as a witness in her own behalf, in answer to the questions put to her testifies as follows:

Direct Examination.

Mr. JUDSON.—Q. You may state your name.

A. Evelyn Mason.

Q. Are you the widow of Geo. Mason, deceased?

A. I am.

Q. And the beneficiary under the policy sued on in this action? A. Yes.

Q. Did you demand of the defendant the payment of this sum of money due under the policy?

A. I did.

Q. Has it ever been paid?

Mr. SCALLON.—No question about that, your Honor.

A. No.

Q. No part of it? A. No.

Q. Mrs. Mason, where do you reside? Where is your home? A. 2200 First Avenue North.

Q. And where did you reside at the time of the death of Mr. Mason?

(Testimony of Mrs. Evelyn Mason.)

A. At 2200 First Avenue North.

Q. Who owns the house at 2200 or who owned it?

A. It is our home.

Q. And what size of a house is that?

A. It is a small bungalow.

Q. How many rooms? A. Five and a bath.

Q. Is there a basement in that house?

A. Yes; half basement.

Q. Full basement or— A. No, half basement.

Q. And was that home paid for?

A. Yes; it was paid for.

Q. It belonged to you and Mr. Mason?

A. Yes.

Q. What were your relations, yours and Mr. Mason's, as to whether they were pleasant or otherwise, Mrs. Mason? [99]

A. Always very pleasant.

Q. And did you and Mr. Mason have any children?

A. Baby girl, four years old.

Q. And what was Mr. Mason's disposition as to whether or not he was of a pleasant disposition or morbid?

A. No; George was unusually happy.

Q. And the day of his death how was he, how did he appear?

A. Why, he was very pleasant.

Q. What time, Mrs. Mason, did Mr. Mason come home that day, if you remember?

A. At six o'clock in the morning.

Q. Of the sixth of June? A. 6th of May.

Q. 6th of May, 1919. And how did he appear to

(Testimony of Mrs. Evelyn Mason.)

be at that time? Did you notice anything unusual about him? A. No, he was in a good humor.

Q. And what did he do? Did he go down town during that day?

A. No, not that morning; he went to bed.

Q. Then you may state when he got up.

A. Why, I woke him up about 11 o'clock and he got up then and he played with the baby. She went in the room and woke him up and I was getting breakfast. I didn't sleep well that night; I didn't wake up early, and I was going downtown, and he says, "I believe I will go down, too, and get the gun and some shirts and get the money," that he had coming.

Q. Now, the gun,—what did you mean by "he would get the gun"?

A. I had asked him to get the gun—

Mr. SCALLON.—One moment, please. We object to oral communications between these parties, on the ground the witness is incompetent to testify to the same, first, because she was the wife of the deceased and, second, because she is a party to the suit and, regardless of marital relations, the communications would be between a party to a suit and a deceased person, and therefore, doubly incompetent. We refer to, and your Honor of course is familiar with, the provision of the law relating to married people, and in addition to that, if your Honor please, in [100] the Act passed in February, 1913, there occurs a fourth subdivision, together with the introductory sentence, reads as follows:

"The following persons cannot be witnesses: Parties or Assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transactions or oral communication between the proposed witness and the deceased, or the deceased agent, of such person or corporation, and between such proposed witness and any deceased officer of such corporation." The statute, as your Honor will see, introduces a disqualification that had not formerly obtained under the Montana statute, by introducing that subdivision four. It happens, if your Honor please, that the statute is not correctly printed in the official edition of 1913. In supplement published by Bancroft-Whitney it is substantially complete, but not absolutely so; there is an absence of a comma and the absence of the article "the." I have here a certified copy of the law.

The COURT.—Has this law been construed by the courts?

Mr. SCALLON.—Not that I know of.

(After a recess.)

The COURT.—I am of the opinion that this new enactment of 1913 has no application to a case such as that now before the Court. There are two or three words in it that render it somewhat ambiguous and somewhat confusing, but I am of the opinion that it relates to a case wherein the defendant person is deceased, or the agent of the defendant is deceased, or the agent of a corporation or the officer of a corporation is deceased, where the witness about to testify

purports to testify to evidence happening with that deceased person. This is not such a case to which the law is designed to apply. The defendant, no agent or officer, is involved; simply a statement of a witness and party's deceased husband to her. Now, as to the provision of the law that no husband nor wife, without the consent of the other, can be examined as to any communication made by one to the other during marriage, of course that law is designed for a good purpose, supposed to be better for the peace and happiness of the family and for communities in general that husband and wife be not permitted to testify as to what happened between them, either against [101] the other, or in any other proceeding, unless both are willing. Where one is dead, of course the consent of that person cannot be procured and ordinarily the testimony of the other to what took place between them during the marriage relation, received during the married relation, would be excluded, but in this case the defendant has already introduced some testimony as to what this witness said had taken place between her and her husband in her lifetime, and I am of the opinion that, so far as the defendant will be in position to invoke that rule of law, that they have waived it and can waive it; parties can waive it; they waived it by appealing to those very confidential communications which it is the policy to bar. For instance, they have had witness Silk testify as to what this witness testified to at the coroner's inquest in reference as to what her husband had said to her, and produced an envelope

(Testimony of Mrs. Evelyn Mason.)

written by him to her which she had secured. Therefore, for these reasons, the objection, which I believe otherwise would be good, will be overruled.

Mr. SCALLON.—Note an exception.

Q. Please read the last question.

Mr. SCALLON.—To avoid entering any further objections of record, it may be understood this goes to the whole of this.

The COURT.—I think so, yes, so far as it touches communications between the witness and deceased husband, private communication.

Q. You may answer that now, Mrs. Mason?

A. I had asked him to get the gun because someone had broken in the back door before and someone was around the house that night, and a few days before he promised to get it and he never got it, and that evening I was downtown, baby and I, and I went into the Gerald Café and I went in the back box and Mr. Frederickson waited on us and George came in and I asked him if he had seen about getting the gun, and he said, "No, but I will to-night as soon as Mr. Burns comes in."

Q. Who is Mr. Burns? A. He is the sheriff.

Q. And why did he want to see Mr. Burns, the sheriff?

A. Why, he was going to get a permit to get the gun, but he thought [102] he could get it without getting the permit.

Q. Now, then, he left the house, did he?

A. Why, he talked awhile and then I was dressing and he went before I did, on the car.

(Testimony of Mrs. Evelyn Mason.)

Q. Where did he go,—downtown?

A. He went downtown.

Q. And in what spirits was he when he left the house?

A. Why, he seemed happy; he come back and kissed me and he had been playing with the baby and rolling on the floor with an orange.

Q. What did you do after that when he left for downtown?

A. I finished dressing and then baby and I went downtown.

Q. And when did you return home?

A. I think it was near 4:00 o'clock.

Q. And this was on the 6th day of May, 1919?

A. Yes.

Q. When you returned home what did you discover, if anything?

A. Well, I left the door so he could get in, and I seen he fed the dog, and I went in and I saw he brought a package in, and baby ran in the room and I called her and told her not to wake up daddy and she said "He isn't there," and I heard him calling from the basement.

Q. What did he say?

A. He said, "Mae, Mae!"

Q. What did you do then?

A. I ran down in the basement.

Q. What did you discover?

A. He was lying on the bed.

Q. What bed? What do you refer to?

(Testimony of Mrs. Evelyn Mason.)

A. The bed in the basement; we had a bed in the basement.

Q. Why did you have a bed in the basement?

A. When it was very hot last summer he always slept in the basement, and I had taken the mattress off and I hadn't put it on yet this year.

Q. That is, he had worked nights, had he, for years?

A. Yes, since we have been back, three years and over.

Q. What did you then do when you got down to the basement?

A. He said, "I bought that gun and it shot me twice." [103]

Q. And did you see a gun there?

A. The gun was lying by the bed.

Q. And what did you do then, if anything?

A. I don't know. I was so excited,—I started to pick the gun up and he grabbed hold of my hand and told me not to touch it, it would shoot me, it shot repeatedly, and he didn't want me to touch it.

Q. Then what did you do?

A. I helped him upstairs and called the doctor, phoned down to Miss Edith and she sent the doctor up.

Q. Who is Miss Edith?

A. The cashier of the Gerald Café.

Q. And while you were in the basement did he say anything else to you or—did he say anything to you about the shooting while you were in the basement?

(Testimony of Mrs. Evelyn Mason.)

A. I asked him how it happened and he said, "I didn't mean to."

Q. And how did he get upstairs then?

A. I helped him upstairs.

Q. And where did you go with him when you went upstairs?

A. Into the bedroom and he lay on the bed.

Q. And I believe that is where he was when the doctor came?

A. Yes; he was in the bedroom where we slept.

Q. When he was downtown that day did he make any other purchases that you know of?

A. Yes; he bought some elastic rubber and tape to fix his aprons.

Q. Where did you find that?

A. It was lying on the table; and a box of cartridges was on the table too.

Q. There was some talk about an envelope that was there; what was said about that envelope when you saw him?

A. When I went down the envelope was sitting on the bed, at the head of the bed. The post goes up; and he told me to take the money and stick it in my dress. I says, "Why do you think of money now?" He says, "If I have to stay in the hospital you will need that money."

Q. Did he say when he wrote that note? [104]

A. Why, he said he tried to get up and he couldn't, and he thought he was dying, so he didn't want to have the money in his pocket and afraid I wouldn't get it, so he took an envelope off the floor, and a

(Testimony of Mrs. Evelyn Mason.)

trunk at the head of the bed, and he wrote it with a short pencil he had in his pocket to write orders with; the pencil was on the floor.

Q. You may state where this envelope came from, if you know.

A. Why, it either come out of the waste-basket or old envelopes I had in the trunk, my boy had when he was at home, to write, some cheap ones, and Fern had it playing down there; I don't know if he got it out of the waste-basket or out of the trunk.

Q. When he left for downtown had he shaved yet that day? A. No, he didn't shave yet.

Q. How was he after you found him downstairs there?

A. Why, he shaved after he came home.

Q. You may state if there was any evidence of his having shaved after he came up?

A. When I came upstairs I got blood on my hands and went to get a towel and wipe his hands and my hands and when he shaved he wiped his razor on tissue paper, and it was hanging on a little glass we have over the wash-basin and rock he sharps his razor with was on paper and I knocked it off too, and the soap was on too.

Q. You mean the fresh lather?

A. Yes, where he went to shave.

Q. When he went to shave how did he arrange his clothing?

A. He always unbuttoned them and rolled them back, because he sponged his chest with cold water. He shaved every day.

(Testimony of Mrs. Evelyn Mason.)

Q. You may state how at times he went about the house during warm weather.

A. I don't know why, he never buttoned his clothes up all the way in front.

Q. What do you mean, his clothes?

A. His underwear; and that day this undershirt was awfully tight and he told me to leave his B. V. D.'s out, and I hadn't got them out yet. [105]

Q. Will you please show the jurors, if you can, by your own waist-coat there, or coat, how his shirt was rolled back.

A. He always rolled it back like that on each side, and then he sponged his chest with cold water and under his arms.

Q. You may state, if you know, whether or not he had—did you have any other gun there?

A. We had an old gun that we had had for a long time, but it was broken.

Q. Did he ever shoot that gun at any place in the house?

A. Why, he shot it a few times down in the basement, but when the armistice was signed we gave it to the baby to play with and it got rusty and the cylinder wouldn't roll around, and he said it was no use to get any cartridges for it because it wouldn't shoot any more.

Q. You may state whether or not just prior to his death there was any evidence of someone trying to get into your house shortly prior, other than the one you mentioned at the door?

A. That night before someone tried, pried the

(Testimony of Mrs. Evelyn Mason.)

screen partly off the window, the side window where the fireplace is, and I told him when he came home.

Q. What evidence was there there that that had been done?

A. When I told him he said it was the coal cracking in the basement; then he went out and looked and there was a piece of steel about that long (indicating) under the window, and he brought that in, and he was angry and said, "I am going to get that gun and if someone tries to get in the house, to shoot them."

Q. Do you know whether or not your husband had been informed about some particular persons that had tried to get into his house?

A. Yes, sir; someone had told him some men here in town were the ones.

Q. What, if anything, had you and Mr. Mason planned to do in the spring of 1919, just prior to his death or about that time?

A. Why, we were going to sell this home and take the money we had and a few liberty bonds and try to buy a larger place closer in, where we could [106] have a couple of roomers and I wouldn't be afraid to stay alone.

Q. And for that purpose did he attempt to get any money any place?

A. That is the reason he sold this stock we had.

Q. Where did you have this stock?

A. A few shares of Alaska Gold in Lake's office.

Q. H. B. Lake Company's?

A. Anaconda Company, the shares was.

(Testimony of Mrs. Evelyn Mason.)

Q. Your husband, was he financially embarrassed?

A. No; we had money; we had a few liberty bonds.

Q. Did he owe any money?

A. No; we probably owed $30 altogether in town.

Q. Now, you may state whether or not your husband went to California shortly prior—some time during last spring during 1919?

A. Why, he had not heard from his sister for several years and he just had located her and he eat some cheese and had a touch of ptomaine poison, so he said he thought it would be a good time to lay off and go to see his people, so we took the trip to California.

Q. Did you go with him and the little girl?

A. Yes; the baby and I went.

Q. And you may state whether or not until he had this illness, what you term as a touch of ptomaine poisoning, he was ever ill before.

A. No, George was never sick; he was a Christian Scientist and he never taken any medicine; he didn't while he was sick this time; he said he cured himself in three days.

Q. Did you hear the statements of Dr. Durnin this morning that he mentioned when he said that you were riding to the hospital with him.,

A. Yes, I did.

Q. Did you make such statements at that time?

A. I never spoke to Dr. Durnin from the time I left my home until the time he told me that George was dead.

(Testimony of Mrs. Evelyn Mason.)

Q. Have you had a little trouble with Mr. Durnin? [107]

A. No; Dr. Durnin charged me $200 for my bill.

Q. Did you have a dispute with him about that?

A. No; I tried to get him to cut the bill down and he wouldn't.

Q. You haven't settled with him yet, Mrs. Mason?

A. No; I sold my furniture and I paid him $100, and he holds the other on my house.

Q. Mrs. Mason, what do you say that he said about the gun when you went downstairs? I am not sure whether the jury heard that or not.

A. He told me, "I bought that gun and it shot me twice," and he told me not to touch it that it shot repeatedly, that it might shoot me.

Q. What else, if anything, did he say about it?

A. He told me he didn't mean to shoot hisself—"Why would an accident happen like this?"

Q. Did he say anything about whether or not he was shot seriously?

A. No, he told me he didn't think he was, when we were in the basement.

Q. You may state whether or not he said anything to you about—

A. He told me not to worry, everything would be all right.

Cross-examination.

Mr. SCALLON.—Q. Mrs. Mason, where did Mr. Mason carry that little pencil that you spoke about?

A. In the little pocket in his trousers, where you put your watch.

(Testimony of Mrs. Evelyn Mason.)

Q. And what do you say about his hands when you found him, after the shooting?

A. He had blood on one of his hands; when he got hold of me I got it on me,—I put my arm around him when you carried him upstairs.

Q. Which way was he lying in relation to the bed?

A. He was lying with his head this way,—this was the foot of the bed, and head was in the corner, and he was lying this way; the truck was right by the bed, and he was lying with his head toward the trunk and his feet right across the bed. [108]

Q. With his head toward the trunk? A. Yes.

Q. Lying on his back? A. Yes, on his back.

Q. And on the right side of the bed, was it?

A. The bed is this way, and he was lying here; no, left side.

Q. The bed was up against the wall or partition?

A. Yes, the wall in the corner.

Q. In the corner? A. Yes.

Q. In which corner?

A. In the left-hand corner of the house, left side.

Q. Left side as you go down into it?

A. No, the right side as you go down in the basement, as you go down the steps.

Q. You go down the steps?

A. You go down the steps and then turn by the furnace; the furnace is in the middle of the basement, and the bed is there, and the foot is toward that way, and head is towards the furnace.

Q. The head of the bed was toward the furnace, you mean? A. Yes.

(Testimony of Mrs. Evelyn Mason.)

Q. Where was the trunk,—up against the wall or close to the furnace?

A. The trunk,—there is a partition thru half the basement—the trunk is against that partition, against where the foot part of the bed is; he was lying with his head toward the foot part of the bed.

Q. Toward the foot part of the bed? A. Yes.

Q. And was the bed in the front part of the basement or the rear part? A. In the rear.

Q. In the rear? A. Yes.

Q. On what side of the street is the house?

A. The house is on the right-hand side as you—

Q. —as you go out?

A. Yes, as I go up on First Avenue North.

Q. First Avenue North?

A. Yes, it is right on the corner of 22d.

Q. That is an avenue parallel to Central Avenue here, is it? A. Yes. [109]

Q. Runs in the same direction? A. Yes.

Q. Out the way I am pointing now in relation to the courthouse? A. Yes.

Q. And you are on the right-hand side of the street, the house? A. Yes.

Q. And the staircase goes down toward the front of the building, does it?

A. In the rear, the stair, it goes down from the kitchen.

Q. But as you go down the staircase, you are going toward the front of the building?

A. Going toward the side, toward the street; the stairway opens toward the side.

(Testimony of Mrs. Evelyn Mason.)

Q. Toward one side of the building? A. Yes.

Q. It goes down along the side? A. Yes.

Q. But as you go downstairs you are facing toward the street?

A. Yes, toward the street, not the avenue.

Q. Eh?

A. Not the avenue,—the street; the stairway faces the street, not the avenue. This is First Avenue North and this is 22d Street.

Q. You were on the corner? A. Yes.

Q. Well, now, at which end of the cellar or basement is the staircase?

A. It is the rear end on the right-hand side coming this way, I think, I don't know.

Q. Well, the bed was up against the partition, as I understand you?

A. The middle partition, yes, in the corner.

Q. And he was lying with his head toward the foot of the bedstead? A. Yes.

Q. And that is where the trunk was, up against the partition? A. Yes, sir.

Q. So that his head was away from the furnace?

A. Yes, it was away from the furnace.

Q. And he was lying on his back? A. Yes.

Q. And when he took hold of you, he took hold of you with the hand nearest to you, didn't he? [110]

A. No, I think he reached over with his other hand.

Q. You think he reached over? A. Yes.

Q. He turned over, did he, sit up first?

A. No, he kind of raised his arm and he reached over.

(Testimony of Mrs. Evelyn Mason.)

Q. Reached over? A. Yes.

Q. Now, how much blood was there on his hands?

A. At that time there was only a little bit; when he got up he tried to close his shirt and he got more.

Q. It was upstairs that you wiped the blood off his hands, was it, or downstairs?

A. I wiped it off my arm and a little bit off my finger upstairs, after I laid him on the bed, after I had called the doctor and Mrs. Burnhart.

Q. You got blood on your arm, you say?

A. Yes, I got blood on my arm.

Q. Do you remember which arm it was?

A. It was on this one.

Q. The left arm? A. Yes.

Q. Is the staircase enclosed? A. No, it isn't.

Q. Or just— A. Just plain stairway.

Q. Is there any railing to it?

A. No, there is no railing.

Q. No railing. In going up against the stairs was he up against the wall or away from the wall?

A. No, he was away from the wall; I was up against the wall; he had his right arm over my shoulder and I put my other hand around his waist.

Q. And you took him into the room? A. Yes.

Q. Or walked with him into the room; he walked up himself, didn't he? A. No, I helped him up.

Q. You helped him, but he walked, you didn't carry him? A. No, I couldn't carry him.

Q. And both of you walked into the room?

A. Yes. [111]

Q. And laid down on the bed? A. Yes.

(Testimony of Mrs. Evelyn Mason.)

Q. The bed which you two were occupying?

A. Yes.

Q. What became of the gun?

A. Dr. Durnin taken the gun.

Q. Now, I show you a diagram here and ask you whether that correctly represents, approximately of course, the basement, the staircase, and the position of the furnace and the bed.

A. No, that bed was up close in the corner, right up against the wall; the trunk is there all right, but put the bed right up between the trunk and wall and the trunk is right by the head of the bed.

Q. Otherwise is it correct?

A. Yes; the coal-bin is much larger than that.

Q. Yes, but that is the place where it is?

A. Yes, this is similar, something similar, but it is bigger than that. The basement is about half dirt and half the other.

Q. In other words, there is not as much excavated as there is shown here? A. No.

Q. Compared with the whole size? A. Yes.

Q. You would make this apartment larger there?

A. Yes, it is larger.

Q. It is about as large as the other part or smaller?

A. Just a little bit smaller.

Q. Well, suppose we rub out the old line and mark it about like this? A. Yes, that would be—

Q. —about the size of it? A. Yes.

Q. Now, as to the bed, we will bring this up this way, that would make the bed a little too long possibly, but that would show the position of the bed?

(Testimony of Mrs. Evelyn Mason.)

A. Yes.

Q. Yes.

A. Pushed between that partition and that.

Q. And the trunk, yes; the trunk was between that and the bed. And then Mr. Mason was with his head where the trunk was? A. Yes.

Q. Now, I have rubbed out the old line here that was supposed to mark the end of the basement or one side of it, and I have put this other line as [112] I showed you a while ago, and there were the words "First Avenue" here and I write them at the top of the sheet of paper; I didn't get it off very clean, but it was intended to show that line. That would show approximately now, as I understand you, the size of this portion of the basement? A. Yes.

Q. And the correct relation of the street?

A. Yes.

Mr. SCALLON.—I offer this in evidence. Admitted.

(Marked Exhibit No. 7, Defendant.)

Q. Where do you reside now?

A. At the Foley Hotel.

Q. At the Foley Hotel? A. Yes.

Q. Since when have you lived there?

A. Well, I have lived there three or four months, about three months I believe now since I rented my place.

Q. You rented your place? A. Yes.

Q. And what became of your daughter or little girl? A. I have my little girl with me.

Q. Did you have her all the time?

(Testimony of Mrs. Evelyn Mason.)

A. No, she is going to school part of the day at the Academy.

Q. Did she live with the folks who rented your house?

A. She stays with them sometimes and sometimes she stays with me; I stay up there quite often, too.

Q. Well, was she staying there regularly at any time?

A. Well, she goes to school in the morning and I go up every evening up there.

Q. Well, she was living with them, not staying with you at the hotel?

A. She stays with me part of the time; I get her on Saturday night and Sundays; I take her home so she can go to school Monday morning.

Q. During the week she stays where?

A. She stays with them, and I go up there in the evening.

The COURT.—I can't see that this is relevant, is it?

Mr. SCALLON.—In a way.

A. I couldn't keep up the house.

Q. How long have you lived in Great Falls? [113]

A. I have lived in Great Falls about seven years.

Q. Seven years?

A. Yes, except the fourteen months I was away.

Q. And you got married to Mr. Mason in 1914, did you? A. 1914.

Q. When did you go to live at 2200 First Avenue North?

(Testimony of Mrs. Evelyn Mason.)

A. Three days after we returned from Alaska we bought that little place.

Q. After getting married you went to Alaska, did you? A. Yes, we went to Alaska.

Q. How soon after?

A. We went the next day; we went to Canada and then went from Canada to Alaska.

Q. Where were you living prior to your marriage?

A. I stopped at the Harrington Hotel and then I stopped with Mrs. Barnhart a while; I did some sewing for Mrs. Barnhart and I sewed for other people.

Q. Pardon me; I didn't hear you.

A. I did some sewing, I said, for Mrs. Barnhart and sewed for other people before.

Q. How long had you been sewing before you were married?

Mr. JUDSON.—Objected to—incompetent, immaterial.

The COURT.—Sustained.

Q. You say you lived with Mrs. Barnhart?

A. Yes.

Q. At that time?

A. Yes, when I married I was living with her.

Q. Where was she living at that time?

Mr. JUDSON.—Objected to, incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. SCALLON.—Save an exception.

Q. You have been living in Great Falls, if I understand you? A. Yes. [114]

(Testimony of Mrs. Evelyn Mason.)

Q. Two years before you were married?

A. No, not two years.

Q. How long?

A. A few months; I don't know just how long.

Q. Where was Mrs. Barnhart living when you lived with her?

A. Eighth Avenue South; I don't know the number; I think it is 400 and something. She will know.

Q. Did you see Mr. Curry on the night of the shooting?

Mr. JUDSON.—I object to that as improper cross-examination.

The COURT.—Sustained.

Q. Did you tell anyone on the day of the accident that Mr. Mason had told you that he did not mean to?

Mr. JUDSON.—I object to that as improper cross-examination.

The COURT.—She may answer; overruled.

A. Did I tell anyone?

A. Yes.

A. Why, I suppose I did.

Q. Well, I am asking you for sure, not what you suppose.

A. Yes, I believe I did; yes, I know I did, because Mrs. Barnhart was there and I asked him and he told me.

Q. I am asking whether you told anybody else yourself?

A. That he told me that he didn't mean to?

A. Yes, that he told you that he didn't mean to.

A. Why, no, I don't know if I did or not.

(Testimony of Mrs. Evelyn Mason.)

Q. As a matter of fact, didn't you say on that very day that you believed that he had killed himself?

A. No, I never told anyone, because I know all the time—

Mr. SCALLON.—Just a minute. I am asking you what you told.

Redirect Examination.

Mr. JUDSON.—Q. Mrs. Mason, Mr. Scallon has asked about staying up there at your house. Why haven't you stayed up there at your house?

A. The house, I couldn't keep it up, I couldn't pay the expenses; I had to rent it.

Q. Is there any reason why you couldn't?

A. Well, anyone would know I couldn't stay in that house alone now. [115]

Testimony of J. P. Burns, for Plaintiff.

J. P. BURNS, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him testified as follows:

Direct Examination.

Mr. JUDSON.—My name is J. P. Burns. I am sheriff of Cascade County. I was such sheriff on the 6th day of May, 1919. The next day I went to the home of George Mason to make an examination of the premises. I examined the basement of the house. I found blood, looked as though he had laid down on a spring bed that was there. I found two bullets and two empty cartridges.

Q. Here is a purported diagram of the premises thereof, of the basement, supposed to be approxi-

(Testimony of J. P. Burns.)

mately; will you look at that and tell us whether or not you could tell us from that where you found those empty cartridges?

A. I found one of them right here near this window.

Mr. SCALLON.—Objected to because it is not shown that the premises were in the same condition that they were at the time of the accident, as to position of the cartridges and the shells

Mr. JUDSON.—May I withdraw this witness and ask Mrs. Mason?

The COURT.—I think we will proceed with this witness and show it later. If it is shown sufficiently, it may be stricken out.

Mr. SCALLON.—Save an exception.

I found one of the bullets right here at the bottom on the floor close to the wall. It looked as though the bullet had struck the wall. This is the window on the street on the west side of the building. There were two windows on the west, but this one in the rear appeared to be closed up mostly. The window was on this side and the bed was over on the other side. The distance from the window where I said I found this shell to the bed in the basement was probably 24 or 25 feet, something like that; may be 22 feet. The cartridge I found there was from a 22 Colt's automatic—or 32. The cartridge had been discharged. I found two cartridges there. I found two bullets there. One bullet was near the window and the other one was a little further over this way, further over towards center of the basement. I

(Testimony of J. P. Burns.)

have used an automatic. As to loading a gun and what becomes of the cartridges, well, after [116] they are fired, why they are thrown up; they may go ten or twelve feet away from you after they are discharged, when the injector throws them out, or they might drop right near.

Cross-examination.

Mr. SCALLON.—Q. I understand you to say that you found one of the shells across the room from the bed.

A. I found one of the bullets here, right here.

Q. Yes, and the other one where?

A. The other one was right about here.

Q. Near the furnace? A. Yes.

Q. And did you point out the place where the shells were?

A. I believe there was one shell lay in about here?

Q. That is about midway?

A. About here; yes, sir.

Q. About the middle?

A. Yes; and the other one about here.

Q. One also near the furnace? A. Yes.

Q. And one about halfway all across the room?

A. Yes, sir; close to the north side of the basement.

Redirect Examination.

Mr. JUDSON.—Q. I want to ask Mr. Burns about that; do you remember whether or not that furnace is near the middle of the room?

A. Well, it is a little bit to the east side of the room [117]

Testimony of Henry D. Dunham, for Plaintiff (Recalled).

HENRY D. DUNHAM, recalled as a witness on behalf of the plaintiff, in answer to the questions put to him testified in substance as follows:

Direct Examination.

Mr. JUDSON.—My name is Henry D. Dunham. I am an embalmer for W. H. George Company. I worked for them on the 6th day of May, 1919. I started to embalm the body of George Mason and Warnicker finished. He was clean shaven. As to any indication of a powder-mark on either of his hands, why, I never noticed it to be a powder-mark; there was a little mark right in here and kind of dark; I don't know what it was caused from or anything. It was the left hand; that is what I mean.

Cross-examination.

Mr. SCALLON.—I said there was a little mark right in here on the left hand. Right in there; it was just kind of dark in there is all, between the first finger and the thumb, back of the flesh joining the two, on the outside of the hand. Yes, on top of the hand. [118]

Testimony of John C. Morrison, for Plaintiff (Recalled).

JOHN C. MORRISON, recalled as a witness on behalf of the plaintiff, in answer to the questions put to him testified in substance as follows:

Direct Examination.

Mr. JUDSON.—I was on the stand before to-day.

(Testimony of John C. Morrison.)

I work for W. H. George & Company, undertakers. I saw the body of George Mason at the time of his death or shortly afterwards.

Q. Can you tell the jury whether or not—what was the condition of his face at that time as to whether or not he was shaved?

A. I believe he was clean shaven; I believe I remember remarking to Mr. Dunham—

Mr. SCALLON.—I object to what the witness said to anybody else.

Q. What is your remembrance?

A. I have remembrance, I believe, of him being clean shaven when the body came in.

(No cross-examination.) [119]

Testimony of Mrs. Lottie Burnhart, for Plaintiff.

Mrs. LOTTIE BURNHART, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to her testified in substance as follows:

Direct Examination.

Mr. JUDSON.—My name is Lottie Burnhart. I reside at 114 Seventh Street, South. I am the wife of Sam Burnhart, a traveling salesman. I am acquainted with Mrs. Mason. I knew George Mason in his lifetime. I saw George Mason on the day of his death, after he was injured and before he died. I talked to him that day. Well, he said he didn't mean to do it. Mrs. Mason phoned to me to come up, and I went up there and Dr. Durning was in there and he was at the bedside, so I waited to get

(Testimony of Mrs. Lottie Burnhart.)

my chance to get to the bedside to talk to George, because it was an awful shock to me, a surprise, and when Durnin stepped out of the way I stepped up to the bedside and I took hold of George's hand and asked him what in the world had happened. He said, "Lottie, I didn't mean it." Mae commenced to cry and we both talked and he repeated the same words to her, that he didn't mean it, and then he commenced about the baby.

(No cross-examination.) [120]

Testimony of E. T. Redfern, for Plaintiff.

E. T. REDFERN, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him, testified in substance as follows:

Direct Examination.

Mr. JUDSON.—My name is E. T. Redfern. My occupation is a machinist. As such machinist I have had considerable to do with automatic guns. With bullet wounds having powder marks from a half to three-quarters of an inch out from the edge of the bullet hole, the front or end of the gun would have to be held pretty close to the body,—five or six inches. I have had a good deal to do with testing automatic guns in my experience as a mechanic, and repairing them. [121],

Testimony of Mrs. Evelyn Mason, in Her Own Behalf (Recalled).

Mrs. EVELYN MASON, recalled as a witness in her own behalf, in answer to the questions put to her testified as follows:

Direct Examination.

Mr. JUDSON.—Q. Mrs. Mason, will you tell the jury whether or not that basement was in the same condition in which it was at the time Mr. Mason received the injury in that basement as when Mr. Burns went there?

A. Well, Mr. Burns was the first one that went up; I gave him the key.

Q. And it was locked up and no one could go in the house prior to that time?

A. Yes, it had been locked; no one had been there.

Q. And you went out with the people that were there? A. Yes.

Q. Was that basement left by you just the way it was at the time you found Mr. Mason there?

A. Yes, I didn't go back in the basement any more at all.

Q. Was Mr. Mason experienced with a gun?

A. Why, he told me he never had an automatic in his hands before.

Q. Was he experienced with any kind of gun, if you know?

A. He shot the small one a few times before, but I don't know, he never liked guns.

Q. Was that an automatic?

(Testimony of Mrs. Evelyn Mason.)

A. No, it was a little kind of gun.

Cross-examination.

Mr. SCALLON.—Q. Mr. Mason had been to Alaska how many times?

A. Been to Alaska how many times?

Q. How many times altogether had he been to Alaska? A. Why, I don't know.

Q. Had you met him in Alaska before you went with him?

A. Yes; I didn't go with him; I met him there [122]

Q. So you know of his having been there twice?

A. Yes.

Q. And how long had he been out in the western country, as far as you know?

A. He was up there the 14 months and then he has been here for years.

Q. At what place in Alaska was he?

A. Juneau and Valdez.

Q. In Juneau and Valdez? A. Yes.

Q. In what business was he engaged in there?

A. He was a waiter, waiting table, manager of the Alaska Grill in Juneau and waiter in Valdez.

Q. In one place manager of the grill. A. Yes.

Q. What year was that?

A. When we came from Alaska here three years ago—four years ago now.

Plaintiff rests. [123]

REBUTTAL.

The depositions of Albert Foster and Wm. A. Jones were read without objection. The depositions are (in narrative form) as follows:

Deposition of Albert Foster.

My name is Albert Foster, Jr. I am forty years old; I reside at 38 N. 7th Street, Newark, New Jersey. I am manager of Colt Arms Company, New York office. I have been manager of the New York office of the Colt Arms Company since 1910. I have been in their employ since 1910. Before that I was employed by the Winchester Repeating Arms Company as salesman. The Winchester Repeating Arms Company is a manufacturer of rifles, shotguns and small arms ammunition. I was in their employ from 1902 to 1910. I am familiar with the Colt Automatic pistol, calibre 32, bearing number 248,743. As to how they are numbered, the arms are numbered from one up, starting with each series, or that is, with each model. In other words, the automatic pistol, caliber 32, carrying the serial number 248,743, showed that there had been 248,742 of those pistols made before pistol 248,743 was made. The parts of each and all of the pistols belonging to a serial number are interchangeable, that is, the part of another pistol can be fitted to the pistol which you already have. I have a pistol of the series of the Colt automatic pistols belonging to the serial number 248,743, but it will not have the number 248,743. Only one pistol has that number, but there are at least 248,742 pistols like that one and I can get you one of those. I will produce such pistol, make it a part of and return it with my deposition. The serial number of the pistol I have produced is 321,799. The pistol I have produced and attached to my depositions is

(Deposition of Albert Foster.)

exactly alike serial number 248,743, except as to the number. The experience I have had in familiarizing myself with the various parts and qualities and operation of the pistol I got in capacity of salesman, demonstrating and selling the pistol for a period covering nearly ten years. In fact, I have handled the pistol a longer time than my employment with the Colt Company. Prior to going with the Colt, the Winchester Repeating Arms Company for which I worked, carried this same pistol for sale and I was a salesman [124] for it at that time. I have operated the Colt Automatic Pistol to a considerable extent. I have shot it and demonstrated it for a number of years in demonstrating before Police Departments, banks and others. I am familiar with all its parts. I can take it apart and put it together. I have done that often. The word "automatic" in the name of the pistol which I have produced refers to automatic loading of the barrel and automatic discharge of the exploded shell. The pistol both ejects the empty shell and throws a loaded shell into the barrel automatically, leaving the arm cocked and ready for firing. The pistol which I have produced, corresponding to Colt Automatic Pistol No. 248,743, is loaded by the means of a magazine, which magazine is loaded with eight cartridges. When these cartridges have been placed in the magazine, the magazine is then inserted in the butt of the pistol and the slide pulled rearward all the way back, upon its return forcing the cartridge from the magazine into the chamber or barrel of the arm, leaving

(Deposition of Albert Foster.)

the arm cocked and ready for firing. The magazine when it is loaded with cartridges is put into the butt-end of the gun in its place by simply sliding it in. In order to fire the pistol after it is loaded, it is necessary to exert the pressure both on the trigger and on the spring at the rear end of the pistol, both simultaneously. That is, ordinarily when one wants to shoot the pistol they will press the trigger with the fore-finger of the hand, press the spring at the rear of the pistol with the part of the hand between the thumb and the first finger, and pressure on both of these at the same time is necessary to fire the pistol once. After the pistol is fired once, it could not be discharged without releasing the pressure both on the safety and on the trigger. In order to fire the pistol twice, it would be necessary, first, to exert simultaneous pressure on the trigger and on the spring at the rear of the gun; then, secondly, to release this pressure and exert a similar pressure a second time. No, the gun would not continue firing if the pressure which fired one shot were continued. It would fire a second shot only by releasing the finger from the trigger and the spring in the rear of the gun known as the safety grip. This part of the gun which is referred to in the rear of it as a spring is called a grip safety. And to [125] fire a second time a similar pressure would have to be exerted on the trigger and on the grip safety that was exerted when the first shot was fired. There is a difference between the firing of the pistol in question and the firing of what is known as a machine-

(Deposition of Albert Foster.)

gun. The construction of the arms is entirely different. The machine-gun continues to fire as long as pressure is exerted on the trigger, but this pistol requires releasing of the pressure and the exerting of a new like pressure for every shot that is fired. As to how a person could fire the gun in question which I have produced, into one's own body, this can best be done by using the thumb for operating the spring at the rear of the gun, which is technically called the grip safety,—that is, if the shot was discharged close up to the body one could hold the pistol away from the body and explode it with the forefinger and the hand, just as in ordinary shooting with a pistol, and possibly one could fire the gun close up to one's body by exerting the pressure on the trigger and on the spring at the rear of the gun in the ordinary way, but this would be rather a difficult process. The corporate name of the company for which I am working is the Colt Patent Fire Arms Manufacturing Company. They sometimes make this Colt Automatic Pistol, such as No. 248,743, with a part of the works of the pistol uncovered so as to show the working of it. It is called a skeleton model. I will furnish counsel for the defendant a skeleton model of the Colt Automatic pistol No. 248,743 for use on the trial of this case. [126]

Deposition of Wm. A. Jones.

My name is William A. Jones. My age is fifty-five. I live at 4400 Katonah Avenue, New York City. I am president of a private detective agency

(Deposition of William A. Jones.)

in 302 Broadway, known as William A. Jones, Incorporated. As to the experience I have had with pistols, I was connected with the police department of the State of New York for thirty-one years and eight months. From November, 1895, until July, 1911, I was in charge of the school for pistol practice with the police department. During the summer months the school used to close down. We moulded our own bullets. We used the 32-caliber Colt and Smith & Wesson revolvers. Along with my other duties I had supervision over the school for the instruction of pistol practice. We used what was known as the 380-caliber Colt Automatic Pistol in the school. That is a duplicate of the 32, but the caliber is a little larger. It is known as the 380-caliber. I was attached to the Homicide Bureau of the Detective Bureau along with my instruction in the shooting school, and my duties there were to investigate shooting homicide cases, and in that I covered all of Greater New York, and I have investigated shooting cases with almost every caliber of the pistol and almost every make of pistol that there is in the world. I own seven automatic pistols now myself, different makes. I have a 380 and a 25 and 45 caliber Colt automatic. I have a 35 Smith & Wesson, 32 Savage, 32 Harrington & Richardson. I have a 25 Mauser and a 25 Styer. In my experience in the investigation of homicide shooting cases I have attended between one hundred and fifty and two hundred autopsies, and in those autopsies I have taken notes for the doctors when they have been perform-

(Deposition of William A. Jones.)

ing the autopsy. That was my duty in the investigating of shooting cases. I was connected with the Homicide Police Department of the city from 1909 until I left the department on the 18th of last February. I have owned a Colt Automatic Pistol since it came out, and in any case that I had that an automatic pistol was used I have had the handling of the case all the way through, and I have been handling such pistols all the time since they first came out. I have made thousands of experiments with automatic pistols for powder stains on paper, cloth and different fabrics. I have [127] used it on skin from bodies. Have used it on animal skin by removing the hair with lye. If used on fresh skin it is almost like human skin and we get the same markings on it that we would on human skin. I have used that in a great many experiments to reproduce powder stains on bodies that I have been investigating. I can take a Colt Automatic Pistol down and put it up again. I am familiar with all its workings. The pistol which the witness Foster has produced in these depositions and attached to his deposition as an exhibit which you now show me is Colt Automatic Pistol No. 321,799 32 caliber. The pistol I now have in my hand and which is referred to in my last answer is a duplicate in every respect of Colt Automatic Pistol No. 248,743, except the number. I know that from my experience with these pistols. I know that all manufacturers in manufacturing pistols give each pistol a serial number. They start with No. 1, which is the first of a

(Deposition of William A. Jones.)

series of pistols, and then all that are made of that make of pistol are alike except as to the number. I will explain how the Colt Automatic pistol of the series which I have in my hand and to which No. 248,743 belongs, works. To load this pistol you have to draw the magazine back, insert the cartridges in the magazine, then place the magazine in the frame of the pistol. Then draw the slide back and as it goes ahead into place it loads the pistol. Then to discharge it you have to exert pressure on the grip safety at the rear of the handle and on the trigger at the same time. At the discharge the recoil drives the jacket back and as it goes ahead again it reloads it. If you to continue to exert the pressure the pistol will not go off, but if you release the pressure both on the trigger and on the spring at the rear, and then exert it again just as in the instance of first firing, the pistol will go off again. In order to fire the Colt Automatic Pistol a second time, it is necessary that the pressure both on the trigger and on the rear spring must be released. Then it must again be exerted for the second discharge and for all the discharges after that as long as the magazine has the cartridges in it. The difference between the method of discharging the Colt Automatic Pistol and the method of discharging a rapid-fire gun is [128] that in a rapid-fire gun as long as there is continual pressure on the trigger it will keep right on firing. You have to release the trigger to have the arm stop, but with the Colt Automatic Pistol it loads automatically. It cocks itself automatically, but it does

(Deposition of William A. Jones.)

not fire automatically. You have to release the pressure from the preceding charge and exert it again for each shot. [129]

SURREBUTTAL.

Testimony of E. T. Redfern, for Plaintiff (Recalled in Surrebuttal).

E. T. REDFERN, recalled as a witness on behalf of the plaintiff in surrebuttal, in answer to the questions put to him testified in substance as follows:

Direct Examination.

Mr. JUDSON.—I am familiar with the workings of that automatic gun. I can take that gun down and put it together. I have fired a gun similar to that, so I know their action when they are fired.

Q. I will ask you to turn that gun, take hold of it and turn it toward—point it toward yourself. What would be the action of that gun held in this manner?

A. In this manner?

Q. Yes. I will ask you to hold the gun in that manner; I will ask you what would be the action of that gun held in that manner, if the revolver would move after fired? A. The revolver would jump.

Q. How far would that revolver jump?

A. Held in that position it would possibly jump an inch as the gas pressure going out of the side of the gun would have a tendency to thrown the gun.

Q. How fast can that gun be operated, Mr. Redfern, if you know? A. About 8 shots a second.

Q. About 8 shots in a second?

(Testimony of E. T. Redfern.)

A. About as fast as it will function.

Q. You may state whether or not, if you know, you have to release your finger any noticeable amount in order to again fire that gun?

A. You do quite a bit, but you also have to release the lock in the back.

Q. In the rear? A. In the rear.

(Whereupon the plaintiff rested.) [130]

The foregoing, together with the exhibits introduced in evidence and admitted in the case and referred to in the preceding testimony comprise the whole of the evidence introduced in the case. The exceptions noted in the foregoing statement of the evidence were duly taken at the time.

After the conclusion of the evidence, the case was argued to the jury by the respective counsel and then the Court instructed the jury as follows:

Instructions of Court to the Jury.

GENTLEMEN OF THE JURY: To come now to the instructions, which will be very brief.

As in all other cases, the Court advises you what is the law applicable to the case, and you accept the law from the Court, but, as in all other cases, what the facts are, what is proven in the case, what inferences you will draw from the circumstances involved, are entirely for you, the jury.

The Court might comment on the facts, on the circumstances, but if it does so, and even expresses an opinion—which it is not likely to do in this case—it is never in an endeavor to bind you to the same view,

because the Court cannot, but solely in the hope to, aid you to reason to a correct conclusion. So, remember, the Court is responsible for the law, but you, the jury, are responsible for a determination of the facts.

This is what is termed a civil action, not a criminal action. It makes a difference in the matter of the proof. The plaintiff sues upon an insurance policy to recover the face of it, and the defendant, admitting liability to a limited extent, denies that it is liable for the full amount of the face of the policy by reason of the fact that, in accordance with the terms of the policy, it was not to be liable if the insured person committed self-destruction or suicide, and it assumes the burden of satisfying the jury that the deceased did commit self-destruction or suicide.

This insurance policy is a contract just like any other contract between two men or corporations, or men and corporations, to be construed like them and to be carried out and performed like them, and to be enforced by a jury,—no different from any other contract. This contract contains a provision [131] that in the event of self-destruction during the first two insurance years, whether the insured person be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which shall have been paid to and received by the company, and no more. It seems this policy was issued to Mason in December of 1917; its face value was for five thousand dollars, and upon it he had paid two premiums aggregating $445.00, and the only issue in this case, he being dead within the first two

years—and no dispute about these facts—the only issue and question in this case for you is, did he commit self-destruction? Did he commit suicide? In any event your verdict will be for the plaintiff, but if you find that he committed self-destruction or suicide your verdict will be for only the two premiums, $445.00, but if you do not find that he committed self-destruction or suicide then your verdict must be for the plaintiff for the face value, $5,000.00, and interest from a day in last May when proofs of death were made.

Now, in this case the burden of proof is on the defendant to satisfy you, by a preponderance of the evidence, that the deceased person did commit self-destruction or suicide. When I say that the defendant must prove that to you by the preponderance of the evidence, I mean the greater weight of the evidence. You will remember that in a criminal case, in order to prove the defendant guilty, you must be satisfied beyond a reasonable doubt. That is not the rule in civil actions; the party who must prove anything to the satisfaction of a jury needs only prove it by the greater weight of the evidence. You might assume that the evidence for and in behalf of the two parties is before you in two scales, and if the scale in which is the defendant's case does not outweigh the other sufficiently so that you say it has the greater weight and satisfying you that the deceased person committed self-destruction or suicide, then the defendant has not sustained the burden of proof and necessarily your verdict will be for the plaintiff. The preponderance does not mean simply the words

and the language of witnesses; evidence is not limited to the testimony of witnesses, but all the circumstances that surround the case and the incidents involved so far as they are made known to you are evidence in [132] the case and to be taken into consideration by you in determining whether the greater weight of the evidence is with the defendant. Inferences that you draw from circumstances are evidence; that is why circumstances are introduced into a case, so that from them you may arrive at proper judgment, draw proper inferences, such as commend themselves to your mind as reasonable men endeavoring to do justice upon the case before you.

You must remember above all things in this case that there is no room for sympathy, no room for prejudice. Both sympathy and prejudice are the enemies of justice, because they interfere with sound judgment. This is a case merely upon a contract which both parties have a right to have carried out as the defendant and the deceased Mason made it, in accordance with its terms as they made it, regardless of consequences. As I have so often told you, you do not render verdicts in accordance with consequences, but your oath is "a true verdict to render in accordance with the law and the evidence in the case."

In view of this policy, in view of the contract into which Mason entered with the defendant, it does not matter what was the mental condition of Mason; whether he was sane or insane *or insane* does not enter into the matter at all. The only question is whether or not he intentionally committed self-destruction or suicide.

Gentlemen of the jury, in cases of this sort a presumption arises; and a presumption is a fact or a condition which must be assumed to exist without evidence or proof. The presumption in this case at the beginning, and before any evidence is laid before you the presumption is, that the deceased Mason did not commit suicide. The love of life, the instinct of man to preserve his own existence and his own attributes, are supposed to protect him from an act which is condemned by the whole world as immoral and criminal,—the act of self-destruction or suicide. This is the status that the law clothes the deceased and his acts with at the beginning of the case, and you have it in mind as a starting point, from which you begin to weigh the evidence in behalf of the defendant's contention that he did commit suicide, in behalf of the plaintiff's contention that it was accident, in order for you to make up your minds, in view of the whole, whether or not you are satisfied that he did [133] commit suicide, in behalf of the plaintiff's contention that it was accident, in order for you to make up your minds, in view of the whole, whether or not you are satisfied that he did commit self-destruction. Whenever the evidence in the case satisfies you that, in spite of this presumption against suicide, that the deceased did commit suicide, of course the presumption that he did not disappears and you render your verdict in accordance with what you find the fact to be.

In determining whether or not Mason committed suicide, you take into consideration all the facts and circumstances that have been laid before you, not

merely those that have been produced in behalf of the defense, but also those that have been produced in behalf of the plaintiff in this action, and considering them altogether, not weighing one isolated circumstance and passing judgment on it and then casting it aside saying you do not believe it or do believe it, but *taking consideration* all the facts and all the circumstances and derive judgment that satisfies you, in view of the whole; and, as the Court said before, if your judgment is with the greater weight of the evidence and satisfies you the defendant committed suicide, then the lighter verdict, the smaller verdict, is the one you find for the plaintiff.

If the evidence in the case is as consistent, as reasonably consistent, with accident, which is the plaintiff's theory, as it is with suicide which is the defendant's theory, then you ought to choose the hypothesis of accident, because the presumption against suicide goes in aid of that theory. If, however, you cannot reconcile the evidence in the case, including all the circumstances and the inferences you will draw reasonably, as reasonably with accident as with suicide, then of course you reject the theory of accident and render a judgment that the deceased was guilty of suicide. I say you will; I say you do what your duty calls for, if that is your conclusion. The Court does not say that ought to be your conclusion. The only mandate that the law lays upon you is to render a verdict in accordance with your views of the evidence and of the law, not as you would like to do out of sympathy or out of prejudice or anything of that sort.

In determining this question—the only issue as I have said which [134] is in the case—you take into consideration the insured's condition, Mason's condition, so far as it has been shown to you about the time when he did die; his prior statements and actions in so far as they have been laid before you; his feelings; his disposition towards his family in so far as it appears; his financial circumstances and his actions in connection therewith so far as made known to you, in order to determine whether at the last moment he had an intent to voluntarily take his own life and whether or not he did so. The mere fact that you may not be able to discover satisfactorily to yourself any motive for suicide is not conclusive that he did not commit suicide. Very often men do commit suicide without making known their motives, but if you do not discover my motive it is a circumstance that has to be weighed on the side of the plaintiff's theory that he killed himself by accident rather than by intentional conduct—self-destruction and suicide.

You take into consideration, also, in so far as it appears to you, any statements made by the deceased Mason, in so far as you believe they were made. There were some testified to by the doctor who waited upon him—you will remember them; the Court will not go over them; the doctor asked him who did it. "I did it myself; I shot myself twice." But whether or not, if those statements were made, if you believe the doctor's evidence to that fact, whether or not you will accept that statement as indicating suicide is entirely for the jury. Language ought to be given its customary and ordinary meaning unless you see rea-

sons to give it some other meaning. Always view evidence before you reasonably;—what is reasonable? That is the great test of truth—what is reasonable. And there are statements by the doctor that when he was going to the hospital I understood the doctor to say that he and the wife and the deceased rode together to the hospital?

Mr. SCALLON.—Not the deceased, no; the deceased was in the ambulance.

The COURT.—I think that is right. The doctor and the wife went together, and the deceased Mason was taken in the ambulance perhaps or some other way, and he testifies to certain statements that he says she made to him on the way, namely, that she said when he came home from work that [135] day he was not feeling well and she said to him, "If you don't feel like going to work"—I suppose that night, for he was a night worker—"Don't go." The doctor said that she told him that she knew no reason why he should have done that, and she also said—the doctor testified—that he said it was hard for a man feeling like he does to have to work; and then she spoke of the note that she found written, I mean on the envelope and propped up on the mattress of the bed. The theory of the plaintiff is that that note was written, as they claim, after the accident happened. The theory of the defense is that note was written before he committed the act which they term self-destruction and suicide. It is important evidence for you to consider. Ask yourself if it was written before whether it is not a clear intent, preparation for suicide; ask yourself if you believe it was

written after he shot himself whether it was further endeavors to make plain his business affairs or whether he would have limited himself to those particular words, if he accidentally shot himself and then wrote it. So far as appears here there is no word of explanation, no last word of affection for the wife or child or admonition of their care for the future. The Court simply refers to that all as circumstances, all of which you consider in determining the vital issue in this case.

The plaintiff, the widow of the deceased, says she did not make any such statements to Dr. Durnin, that she did not talk to him at all, or did not say anything to him on the way to the hospital, and she said something about the bill being a matter of difference between them and the size and amount of it, some of which she had paid. The question is for you whether or not you believe the doctor has departed from the truth out of prejudice against the widow, or whether you believe the widow has departed from the truth in an endeavor to save the amount of money involved in this action, or whether she may have forgotten. It is not necessary to condemn anyone as having committed perjury in this case. It can always be said that one remembers where another forgets, maybe trifling discrepancies between recollection; all may be honestly endeavoring to lay the situation fairly before you, and yet, although there are differences between them it may be entirely consistent with the truthfulness of both. There is a rule of law in the [136] evidence that you will reconcile conflicting statements of witnesses, if you

can, reasonably and consistent with your view of the entire case. There is another rule of evidence which is that all evidence is to be weighed in the light of what one is able to assert or produce and what the other side is able to deny or offset. There is evidence on the part of the plaintiff and another lady that the deceased person, in their presence alone, each of them so far as I recollect said that he said he did not mean it, that he shot himself but he did not mean it. Now, remember that the defendant cannot bring anything to deny those assertions; they can do nothing to offset it by direct evidence of witnesses, because there was no other witnesses there at the time that they are able to produce. It simply means this, this rule of evidence, this rule you have in mind in weighing evidence, it simply means this, that when a witness can swear to something before you that nobody else can deny you scrutinize the witness' testimony carefully to see whether he or she is taking advantage of her favorable position; for a witness who is reckless enough can go on the witness-stand and swear to anything, any isolated transaction between them and a dead person, which they say happened between them and the dead person only, without any fear of contradiction. There is no presumption of law that a witness will do that; the law simply says you have in mind that they can do it and with that in mind weigh their testimony to see whether or not you give them credibility.

Gentlemen of the Jury, the Court will repeat as it began that the only issue in this case is whether or not the defendant committed suicide. If you are not

satisfied that the defendant committed suicide, your verdict must be for the plaintiff for the full amount. If you are satisfied from a view of all the evidence that the defendant did commit suicide, still your verdict will be for the plaintiff, but for the small amount, $445.00, because that is the contract that the dead man entered into.

When you retire to your jury-room you will select one of your number foreman and proceed to a verdict. It takes twelve of your number to agree upon any verdict in the case.

The Court does not think it necessary to give you the pleadings; [137] simply will give you the two forms of verdict and will let this gun go to the jury-room that you may see the character of the instrument and its operations.

On the 23d day of December, 1919, the jury retired to consider their verdict, and thereupon returned into court a verdict in favor of the plaintiff, and against the defendant for the sum of $5,000.00 and interest.

And, later on the same day, on motion, the defendant was granted forty-two days in which to prepare and serve his bill of exceptions.

On the —— day of December, 1919, judgment was entered on said verdict in favor of the plaintiff.

WHEREFORE, the defendant presents the foregoing bill of exceptions as and for its bill of exceptions to the rulings made and proceedings had on the trial of the above-entitled cause, and prays that the

same may be settled, allowed, signed and filed as such.

FLETCHER MADDOX,
WALSH, NOLAN & SCALLON,
Attorneys for Defendant.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the foregoing bill of exceptions is true and correct, and the same may be settled and allowed and signed as and for the defendant's bill of exceptions to the rulings made and proceedings had on the trial of the above-entitled cause.

Dated —— day of February, 1920.

_____,
Attorney for Plaintiff.

_____,

_____,
Attorneys for Defendant. [138]

Service of the foregoing proposed bill of exceptions is hereby acknowledged and receipt of copy thereof admitted this 2d day of February, 1920.

H. R. EICKEMEYER,
GEORGE A. JUDSON,
Attorneys for Plaintiff.

The foregoing bill of exceptions having been duly and regularly served and presented to the Court for settlement, and the matter of the final settlement of the said bill of exceptions coming on now regularly to be heard:

IT IS HEREBY ORDERED That the said bill of exceptions be, and the same is hereby allowed and settled and is now signed as and for the bill of ex-

ceptions of the said defendant, New York Life Insurance Company, to the rulings made and proceedings had on the trial of the above-entitled cause, and that the same be filed and made a part of the judgment-roll herein, and the same is hereby certified accordingly.

IT IS FURTHER ORDERED that the originals of these exhibits introduced by defendant, to wit, of the envelope, Exhibit No. 6, of the diagram, Exhibit No. 7, and the pistol produced with the deposition of the witness Albert Foster and the shirt of the deceased shall be authenticated by the signature of the Clerk of this court either on the exhibits or on a certificate of authentication attached thereto, and shall be deemed part of the foregoing bill and are hereby made part thereof.

Dated this 16th day of March, 1920.

BOURQUIN,
Judge.

Filed Mar. 16, 1920. C. R. Garlow, Clerk. [139]

Thereafter, on June 19, 1920, petition for a writ of error was duly filed herein in the words and figures following, to wit: [140]

In the District Court of the United States, District of Montana, Great Falls Division.

No. 783.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

To the Honorable GEORGE M. BOURQUIN, Judge of the District Court aforesaid:

The New York Life Insurance Company, defendant above named, feeling aggrieved by the judgment rendered and entered in the above-entitled cause in the District Court of the United States for the District of Montana, on the 26th day of December, 1919, and complaining that in the record and proceedings had in said cause, and also in the rendition and entry of said judgment, manifest error has occurred to the great damage of the said defendant, as more fully appears from the assignment of errors which is filed with this petition, comes now and petitions the above-entitled Court for an order allowing said defendant to prosecute a writ of error out of the United States Circuit Court of Appeals in and for the Ninth Circuit, and that such writ of error may issue out of the said United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record,

proceedings and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals, under and according to the laws of the United States, in that behalf made and provided, and for [141] such other and further order as to the Court may seem meet.

C. B. NOLAN,
WM. SCALLON,
FLETCHER MADDOX,
Attorneys for Defendant.

WALSH, NOLAN & SCALLON.

Filed June 19, 1920. C. R. Garlow, Clerk. [142]

Thereafter on June 19, 1920, assignment of errors was duly filed herein in the words and figures following, to wit: [143]

In the District Court of the United States, District of Montana, Great Falls Division.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Now comes the defendant and plaintiff in error, New York Life Insurance Company, and in connection with its petition for a writ of error from the United States Circuit Court of Appeals for the Ninth

Circuit directed to the above-entitled court, says that in the record, the proceedings and the final judgment made and entered in said cause on the 26th day of December, 1919, manifest errors have intervened to the prejudice of the defendant and plaintiff in error, of which it makes the following assignments, to wit:

I.

The Court erred in sustaining the objection made by the plaintiff to the question propounded by the defendant to the witness Curry in these words, "What about the third sentence," referring to the exhibit marked No. 1 for identification, regarding which the witness was then being interrogated, the third sentence being as follows:

> "It is a terrible strain but will strive to meet it bravely for Fern's sake."

which objection was as follows:

> "Mr. JUDSON.—I object to that as already answered."

The preceding questions and answers as to the third sentence are as follows: [144]

> "Q. Well, about the third sentence in the telegram. A. The third sentence? * * *
>
> A. The third sentence to which you point is an assumption from the second one.
>
> Q. Is not that assumption, if assumption it be, then based on something that she had said?
>
> A. I don't think so.
>
> Q. Well, please read it again.
>
> A. Well, I have read it twice. No, sir, I don't think so. I have told you two or three times that I wrote this at my office on my own initiative,

and that, as I say, naturally follows out of the other; if the first was true the second is a natural consequence.

Q. Yes, I know all of that.

A. And the third one, you might go ahead, the final one is also.

Q. But what I want to get at is whether you wrote, for instance, the third sentence or the last sentence there? The fourth one has not been answered,—mere assumption and without having talked about these matters with Mrs. Mason?

A. The fourth sentence, as you will recall, is a matter of inquiry, or substantially that, that Mrs. Mason—it wouldn't be necessary to ask Mrs. Mason for any information concerning that."

which ruling was duly excepted to.

II.

The Court erred in sustaining the objection of the plaintiff to the offer in evidence of the defendant's exhibit marked "1" for identification, which exhibit is in words and figures as follows:

"53 N. L.

Send NIGHT LETTER PAID and Charge to John A. Curry Personally.

May 6, 1919.

Mrs. Fred T. Benson, [145]
8 West Oak Street,
Chicago, Illinois.

Otto died this afternoon of gunshot wounds self inflicted. The poor boy had been in fair health following return home until to-day when he suddenly

grew despondent and committed the rash act. It is a terrible strain but will strive to meet it bravely for Fern's sake. Wire me if you are coming.

MAE.

Charge this to John A. Curry."

Plaintiff's objection to said offer was as follows:

"By Mr. JUDSON.—Objected to as incompetent, irrelevant and immaterial and not connected with this."

which ruling was duly excepted to.

III.

The Court erred in overruling the objection made by counsel for the defendant to the following question put to the witness Oscar Frederickson by plaintiff's counsel, to wit:

"Did he about the time Mr. Scallon was asking about him say anything about buying some more property in town?"

which objection was as follows:

"Mr. SCALLON.—Objected to as immaterial and irrelevant and also as self-serving."

and to which question the witness made answer as follows:

"He said he was going to sell his stocks he had and was going to buy city property with his money from now on."

which ruling was duly excepted to.

IV.

The Court erred in overruling the objection made by the defendant to another question put by counsel for plaintiff to the witness Oscar Frederickson in these words, to wit:

"Did you hear anyone ask him to purchase a gun?"

which objection was as follows: [146]

"Mr. SCALLON.—Objected to as immaterial and irrelevant and also as incompetent, if your Honor please."

and to which the witness answered as follows:

"A. I did. He has told me. * * *

A. Well, I heard Mrs. Mason say one time, 'George, you will have to get me a gun if you want me to stay out at that house."

which ruling was duly excepted to.

V.

The Court erred in overruling defendant's motion to strike out the statement made by the witness Oscar Frederickson in answer to the question propounded by counsel for plaintiff:

"Had there been anything happen at the house that would cause him that you know of—"

which motion was as follows:

"Mr. SCALLON.—Move to strike that out as incompetent, irrelevant, — statement of the house."

and which answer was as follows:

"Well, there was some people tried to break in the house during the time they was away to California."

which ruling was duly excepted to.

VI.

The Court erred in overruling the objection made by the defendant to the following question put to the witness John C. David:

"You may state whether or not he appeared to be wholly ignorant as to the operation of the gun which you showed him?"

which question referred to the insured, and the said objection was as [147] follows:

"Mr. SCALLON.—Objected to as incompetent, if your Honor please."

and the answer to which was as follows:

"I should say so, yes."

which ruling was duly excepted to.

VII.

The Court erred in overruling the objections to the questions propounded by plaintiff's counsel to the plaintiff while testifying as a witness in her own behalf, and allowing her to complete her answer to the question when it appeared that she was about to testify to a conversation between herself and her late husband, and to testify to conversations and transactions between herself and her said late husband, the insured, and the Court erred in allowing other questions to be propounded by counsel for plaintiff to the said Evelyn Mason regarding conversations and transactions between herself and her said husband, the insured. By ruling of the Court, the objections thus made were deemed to apply to each and every question to be thereafter put to the said witness in regard to the said matters, and applies to them, and the defendant specifies as errors the allowance of each and every of said questions, and the allowance of the answers thereto.

The defendant's said objection was as follows:

"Mr. SCALLON.—One moment, please. We object to oral communications between these parties, on the ground the witness is incompetent to testify to the same, first, because she was the wife of the deceased and, second, because she is a party to the suit and, regardless of marital relations, the communications would be between a party to a suit and a deceased person, and therefore, doubly incompetent. We refer to, and your Honor of course is familiar with, the provision of the law relating to married people, and in addition to that, if your Honor please, in the Act passed in February, 1913, there occurs a Fourth subdivision, together with [148] the introductory sentence, which reads as follows:

" 'The following persons cannot be witnesses: Parties or Assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transactions or oral communication between the proposed witness and the deceased or the deceased agent of such person or corporation, and between such proposed witness and any deceased officer of such corporation.' The statute, as your Honor will see, introduces a disqualification that had not formerly obtained under the Montana statute, by introducing that subdivision four. It happens, if your Honor please, that the statute is not correctly printed in the official edition of 1913. In supplement published by Bancroft-Whitney it is substantially complete, but not

absolutely so; there is an absence of a comma and the absence of the article 'the.' I have here a certified copy of the law.

The COURT.—Has this law been construed by the courts?

Mr. SCALLON.—Not that I know of."

The ruling of the Court thereon was as follows:

"I am of the opinion that this new enactment of 1913 has no application to a case such as that now before the Court. There are two or three words in it that render it somewhat ambiguous and somewhat confusing, but I am of the opinion that it relates to a case wherein the defendant person is deceased, or the agent of the defendant is deceased, or the agent of a corporation or the officer of a corporation is deceased, where the witness about to testify purports to testify to evidence happening with that deceased person. This is not such a case to which the law is designed to apply. The defendant, no agent or officer, is involved; simply a statement of a witness and party's deceased husband to her. Now, as to the provision [149] of the law that no husband nor wife, without the consent of the other, can be examined as to any communication made by one to the other during marriage, of course that law is designed for a good purpose, supposed to be better for the peace and happiness of the family and for communities in general that husband and wife be not permitted to testify as to what happened between them, either against the other, or in any other proceeding,

unless both are willing. Where one is dead of course the consent of that person cannot be procured and ordinarily the testimony of the other to what took place between them during the marriage relation, received during the married relation, would be excluded, but in this case the defendant has already introduced some testimony as to what this witness said had taken place between her and her husband in her lifetime, and I am of the opinion that, so far as the defendant will be in position to invoke that rule of law, that they have waived it and can waive it; parties can waive it; they waived it by appealing to those very confidential communications which it is the policy to bar. For instance, they have had witness Silk testify as to what this witness testified to at the coroner's inquest in reference as to what her husband had said to her, and produced an envelope written by him to her which she had secured. Therefore, for these reasons, the objection, which I believe otherwise would be good, will be overruled."

which ruling was duly excepted to.

Then the following occurred:

"Mr. SCALLON.—To avoid entering any further objections of record, it may be understood this goes to the whole of this.

The COURT.—I think so, yes, so far as it touches communications between the witness and deceased husband, private communications."

The questions and answers allowed by the Court, in pursuance of the said ruling, were as follows: [150]

"Q. Now, the gun,—what did you mean by 'he would get the gun?'

A. I had asked him to get the gun—"

(Here occurred the objection and rulings.)

"Q. You may answer that now, Mrs. Mason.

A. I had asked him to get the gun because someone had broken in the back door before and someone was around the house that night, and a few days before he promised to get it and he never got it, and that evening I was downtown, baby and I, and I went into the Gerald Cafe and I went in the back box and Mr. Frederickson waited on us and George came in and I asked him if he had seen about getting the gun, and he said, 'No, but I will to-night as soon as Mr. Burns comes in.' * * *

Q. And why did he want to see Mr. Burns, the sheriff?

A. Why, he was going to get a permit to get the gun, but he thought he could get it without getting the permit.

Q. Now, then, he left the house, did he?

A. Why, he talked awhile and then I was dressing and he went before I did, on the car.

Q. Where did he go,—downtown?

A. He went downtown.

Q. And in what spirits was he when he left the house?

A. Why, he seemed happy; he come back and kissed me and he had been playing with the baby and rolling on the floor with an orange.

Q. What did you do after that when he left for downtown?

A. I finished dressing and then baby and I went downtown.

Q. And when did you return home?

A. I think it was near 4:00 o'clock.

Q. And this was on the 6th day of May, 1919?

A. Yes. [151]

Q. When you returned home what did you discover, if anything?

A. Well, I left the door so he could get in, and I seen he fed the dog, and I went in and I saw he brought a package in, and baby ran in the room and I called her and told her not to wake up daddy and she said, 'He isn't there,' and I heard him calling from the basement.

Q. What did he say?

A. He said, 'Mae, Mae!' * * *

Q. What did you then do when you got down to the basement?

A. He said, 'I bought that gun and it shot me twice.'

Q. And did you see a gun there? * * *

I started to pick the gun up and he grabbed hold of my hand and told me not to touch it, it would shoot me, it shot repeatedly, and he didn't want me to touch it. * * *

A. I helped him upstairs, * * *

Q. And while you were in the basement did he say anything else to you or—did he say anything to you about the shooting while you were in the basement?

A. I asked him how it happened and he said, 'I didn't mean to.'

Q. How did he get upstairs then?

A. I helped him upstairs.

Q. And where did you go with him when you went upstairs?

A. Into the bedroom and he lay on the bed. * * *

Q. There was some talk about an envelope that was there; [152] what was said about that envelope when you saw him?

A. When I went down the envelope was sitting on the bed, at the head of the bed. The post goes up; and he told me to take the money and stick it in my dress. I says, 'Why do you think of money now?' He says, 'If I have to stay in the hospital you will need that money.'

Q. Did he say when he wrote that note?

A. Why, he said he tried to get up and he couldn't, and he thought he was dying, so he didn't want to have the money in his pocket and afraid I wouldn't get it, so he took an envelope off the floor, and a trunk at the head of the bed, and he wrote it with a short pencil he had in his pocket to write orders with; the pencil was on the floor. * * *

What evidence was there there that that had been done?

A. When I told him he said it was the coal cracking in the basement; then he went out and looked and there was a piece of steel about that long (indicating) under the window, and he

brought that in, and he was angry and said, 'I am going to get that gun and if someone tries to get in the house, to shoot them.' * * *

Q. What, if anything, had you and Mr. Mason planned to do in the spring of 1919, just prior to his death or about that time?

A. Why, we were going to sell this home and take the money we had and a few liberty bonds and try to buy a larger place closer in, where we could have a couple of roomers and I wouldn't be afraid to stay alone.

Q. And for that purpose did he attempt to get any money any place?

A. That is the reason he sold this stock we had. * * *

Q. Mrs. Mason, what do you say that he said about the gun [153] when you went downstairs? I am not sure whether the jury heard that or not.

A. He told me, 'I bought that gun and it shot me twice,' and he told me not to touch it that it shot repeatedly, that it might shoot me.

Q. What else, if anything, did he say about it?

A. He told me he didn't mean to shoot himself, —'why would an accident happen like this?'

Q. Did he say anyhing about whether or not he was shot seriously?

A. No, he told me he didn't think he was, when we were in the basement.

Q. You may state whether or not he said anything to you about—

A. He told me not to worry, everything would be all right."

VIII.

The Court erred in sustaining the objection made on behalf of the plaintiff to the following question put by the defendant to the witness Evelyn Mason on cross-examination, to wit:

"Where was she living at that time?"

The word "she" in said question referred to Mrs. Burnhart, who was also a witness in the case and also referred to by the witness Evelyn Mason in her testimony. Said objection was as follows:

"Mr. JUDSON.—Objected to, incompetent, irrelevant and immaterial."

which ruling was duly excepted to.

IX.

The verdict and judgment are contrary to law.

WHEREFORE, defendant and plaintiff in error prays that said judgment be reversed with directions that the cause be remanded [154] to the United States District Court in and for the District of Montana, with directions to reverse the said judgment and set aside the verdict.

WALSH, NOLAN & SCALLON,
C. B. NOLAN,
WM. SCALLON,
FLETCHER MADDOX,
Attorneys for Defendant and Plaintiff in Error.

Due personal service of within assignment of errors made and admitted and receipt of copy ac-

knowledged this —— day of June, 1920.

_____,

_____,

Attorneys for Plaintiff and Defendant in Error.

Filed June 19, 1920. C. R. Garlow, Clerk. [155]

Thereafter, to wit, on June 19, 1920, order allowing writ of error was duly entered herein in the words and figures following, to wit: [156]

In the District Court of the United States, District of Montana, Great Falls Division.

No. 783.

EVELYN E. MASON,

Plaintiffs,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant,

Order Allowing Writ of Error.

On motion of C. B. Nolan, Esq., Wm. Scallon, Esq., and Fletcher Maddox, Esq., attorneys for defendant herein,—

IT IS HEREBY ORDERED that a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein, be, and the same is hereby allowed; that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said United States Cir-

cuit Court of Appeals for the Ninth Circuit, and that a citation issue in due course.

IT IS FURTHER ORDERED that the bond on error be fixed at the sum of Seven Thousand Dollars ($7,000.00).

Dated June 19th, 1920.

BOURQUIN,
Judge.

Filed June 19, 1920. C. R. Garlow, Clerk. [157]

Thereafter, on June 19, 1920, bond on writ of error was duly filed herein in the words and figures following, to wit: [158]

In the District Court of the United States, District of Montana, Great Falls Division.

No. 783.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant,

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, New York Life Insurance Company, a corporation, as principal, and National Surety Company, as surety, are held and firmly bound unto Evelyn E.

Mason in the sum of Seven Thousand Dollars ($7,000.00), lawful money of the United States, to be paid to her and to her executors, administrators and successors, to which payment well and truly to be made we bind ourselves, jointly and severally, and each of our successors and assigns, firmly by these presents.

SEALED with our seals and dated this 18th day of June, 1920.

WHEREAS, the above-named defendant and plaintiff in error, New York Life Insurance Company, is about to petition for a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled case;

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant and plaintiff in error shall prosecute its writ to effect, and answer all damages and costs, if it fails to make its plea good, then this obligation shall be void, otherwise to remain in full force and effect.

It is expressly agreed by the National Surety Company, the [159] surety above named, that the signing of the name of said New York Life Insurance Company by its attorneys is to be deemed sufficient to all intents and purposes, and that in case of a breach of any condition of this bond, the Court may upon notice of not less than ten days to said National Surety Company proceed summarily in this action to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment

against said National Surety Company and award execution therefor.

NEW YORK LIFE INSURANCE COMPANY,
By WALSH, NOLAN & SCALLON,
Its Attorneys.

NATIONAL SURETY COMPANY,
By A. L. SMITH,
Resident Vice-President,

[Seal] Attest: ROBERT S. KING,
Resident Asst. Secretary.

The foregoing bond on error is hereby approved this 19th day of June, 1920.

_____,
Judge.

Filed June 19, 1920. C. R. Garlow, Clerk. [160]

Thereafter, on June 19, 1920, a citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [161]

In the District Court of the United States, District of Montana, Great Falls Division.

No. 783.

EVELYN E. MASON,
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Defendant,

Citation.

United States of America,—ss.

To Evelyn E. Mason, Plaintiff Herein, and to George A. Judson, Esq., and H. R. Eickemeyer, Esq., Her Attorneys:

You are hereby notified that in a certain cause wherein Evelyn E. Mason is plaintiff and the New York Life Insurance Company is defendant, pending in the District Court of the United States for the District of Montana, a writ of error has been allowed and granted to said defendant to the Circuit Court of Appeals of the United States for the Ninth Circuit. You are hereby cited and admonished to be and appear in said Circuit Court of Appeals at the city of San Francisco, in the State of California, within said Ninth Circuit, thirty days after the date of this citation, to show cause, if any there be, pursuant to said writ of error, why the judgment made and entered in said cause in said District Court should not be corrected and speedy justice done the parties in that behalf.

Dated 19th day of June, A. D. 1920.

BOURQUIN,
Judge. [162]

Dues personal service of the foregoing citation made and admitted and receipt of a copy thereof acknowledged this 21st, day of June, A. D. 1920.

GEORGE A. JUDSON,
H. R. EICKEMEYER,
Attorneys for Plaintiff. [163]

[Endorsed]: No. 783. In the District Court of the United States, in and for the District of Montana, Great Falls Division, Evelyn E. Mason, Plaintiff, vs. New York Life Insurance Company, a Corporation, Defendant. Citation. Fled June 23, 1920. C. R. Garlow, Clerk. By H. H. Walker, Deputy Clerk. [164]

Thereafter, on June 19, 1920, a writ of error was duly issued herein, which original writ is hereto annexed and in the words and figures following, to wit: [165]

In the District Court of the United States, District of Montana, Great Falls Division.

No. 783.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the District of Montana, and to the District Court of the United States for the District of Montana, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in

said District Court, before you, between Evelyn E. Mason, plaintiff, and New York Life Insurance Company, a corporation, defendant, manifest error hath occurred and happened to the said defendant, New York Life Insurance Company, as by its petition for a writ of error and assignment of errors appears, we being willing that such error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you if judgment therein given that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ in said Circuit Court of Appeals, to be then and there [166] held, that, the records and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States Supreme Court, this 19th day of June, A. D. 1920, and of the Independence of the United States the one hundred and forty-fourth.

[Seal] C. R. GARLOW,
Clerk of the District Court of the United States, District of Montana.

Due personal service of the foregoing writ of error made and admitted and receipt of a copy thereof acknowledged this —— day of June, A. D. 1920.

_____,

_____,

Attorneys for Plaintiff.

ANSWER OF COURT TO WRIT OF ERROR.

The answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I hereby certify, under the seal of said District Court, to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal] C. R. GARLOW,
Clerk. [167]

[Endorsed]: No. 783. In the District Court of the United States, in and for the District of Montana, Great Falls Division. Evelyn E. Mason, Plaintiff, vs. New York Life Insurance Company, a Corporation, Defendant. Writ of Error. Filed June 23, 1920. C. R. Garlow, Clerk. By H. H. Walker, Deputy Clerk. [168]

Thereafter, on June 23, 1920, acknowledgment of service was filed herein, in the words and figures following, to wit: [169]

In the District Court of the United States, District of Montana, Great Falls Division.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Acknowledgment of Service.

The plaintiff, through her attorneys, hereby acknowledges service on the 21st day of June, 1920, by copies, of the following papers in the above-entitled cause, to wit:

Petition for writ of error, assignment of errors, order allowing writ of error, bond on error and writ of error.

GEORGE A. JUDSON,
H. R. EICKEMEYER,
Attorneys for Plaintiff.

Filed June 23, 1920. C. R. Garlow, Clerk. [170]

Thereafter, on June 23, 1920, a praecipe for transcript of record was duly filed herein, in the words and figures following, to wit: [171]

In the District Court of the United States, District of Montana, Great Falls Division.

No. 783.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

Praecipe for Transcript of Record.

To George A. Judson, Esq., and H. R. Eickemeyer, Esq., Attorneys for Plaintiff, Evelyn E. Mason, and Charles R. Garlow, Clerk of said Court:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned, the attorneys for the defendant and plaintiff in error above named, hereby serve upon you and each of you this praecipe in conformity with the rules of court, to indicate to you the portions of the records and files in the above-entitled cause which said defendant and plaintiff in error desires to and will incorporate in its transcript of record on writ of error herein, to wit, the writ of error issued herein on the 19th day of June, 1920, to have judgment hereinbefore rendered and entered herein reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and the clerk of said

District Court will incorporate and include in said transcript the following:

1. The judgment-roll or final record in said cause consisting of the complaint, petition for removal, answer, reply, verdict, judgment entered December 26, 1919.

2. Bill of exceptions signed and filed on the 16th day of March, 1920.

3. Petition for writ of error and order allowing same. [172]

4. Assignment of errors filed with petition for writ of error.

5. Writ of error, and bond on error.

6. Citation on writ of error and acknowledgments of service by plaintiff and defendant in error.

7. Copy of this praecipe.

FLETCHER MADDOX,
WALSH, NOLAN & SCALLON,
Attorneys for Defendant.

Filed June 23, 1920. C. R. Garlow, Clerk. [173]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 173 pages, numbered consecutively from 1 to 173, inclusive, is a full, true

and correct transcript of the record and all proceedings had in said cause, and of the whole thereof, required to be incorporated in the record on appeal therein by the praecipe of the plaintiff in error, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of $78.35 and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 15th day of July, 1920.

[Seal] C. R. GARLOW,
Clerk. [174]

[Endorsed]: No. 3523. United States Circuit Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a Corporation, Plaintiff in Error, vs. Evelyn E. Mason, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed July 19, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3523

United States
Circuit Court of Appeals
For the Ninth Circuit.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,
Plaintiff in Error,

vs.

EVELYN E. MASON,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

WALSH, NOLAN & SCALLON
FLETCHER MADDOX
Attorneys for Plaintiff in Error.

STATE PUBLISHING CO., HELENA, MONT.

United States
Circuit Court of Appeals
For the Ninth Circuit.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,
Plaintiff in Error,

vs.

EVELYN E. MASON,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Statement

The writ of error in this cause is prosecuted from a judgment against the plaintiff in error, defendant below, in favor of the defendant in error. The suit was brought by the defendant in error on a life insurance policy for $5,000.00 on the life of George Mason, late husband of defendant in error. The policy was made payable to "Evelyn E., wife of the insured * * * Beneficiary, (with the right on the part of the insured to change the Beneficiary in the manner provided in Section 6)". (Tr. p. 5.) A copy of the policy is

attached to the complaint. (Tr. pp. 5-31.) In Section 6 of the policy, we find the following:

> "Change of Beneficiary.—The Insured may at any time, and from time to time, change the beneficiary, provided this policy is not then assigned. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the Policy for indorsement of the change thereon by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change shall relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured be living at the time of such indorsement or not. In the event the death of any beneficiary before the Insured the interest of such beneficiary shall vest in the Insured." (Tr. p. 15.)

The defendant below pleaded, as its defense, that the deceased had committed suicide. (Tr. pp. 56-57.) (Here we may note that by some mistake the original answer of the defendant, which was quite lengthy and pleaded other matters, is incorporated in the transcript. That matter is useless because the original answer was superseded by the amended and substituted answer appearing on pages 56 and 57 of the transcript. The last is, therefore, the only one that need be referred to.)

Issue was joined upon that defense. The policy contains suicide clause reading as follows:

> "Self-destruction.—In the event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company and no more. Except as provided by endorsement hereon." (Tr. pp. 18-19, 57.)

It appears from the undisputed evidence in the case that the deceased died of two pistol wounds caused by two shots from a pistol which the deceased held in his hand. The defendant below contended that the wounds had been inflicted voluntarily. The contention of the plaintiff below was that the wounds were accidental.

The shooting occurred rather early in the afternoon in the basement of a house in Great Falls wherein the deceased lived with his wife and their one child. The wife and child were out of the house at the time, having gone down town. There was in the basement a bedstead on which was a set of springs. The plaintiff below testified that upon returning to the house she heard the voice of her husband calling from the basement below, that she went down and found him lying on the springs on the bedstead; that there was propped up near the head of the bed money in an envelope, to-wit, in bills amounting to $745.00. Over

the objection of the company defendant, the wife was allowed to detail what took place between herself and her husband at that time and later including conversations between them. The details of her testimony will be referred to more at length hereinafter. According to her testimony, the deceased arose from the bed and with her assistance walked upstairs into their bedroom and laid down on the bed. (Tr. pp. 113-126) A doctor was sent for and he and two friends appeared at the house. The deceased was moved to the hospital where an operation was performed upon him and where he died the same night. According to the doctor's description of the wounds, one bullet entered one inch to the left of the median line of the body, went through the front anterior portion of the diaphragm, through the left border of the liver, through the stomach, through the upper and outer part of the left kidney, passing out three inches from the spine. The outer bullet entered two and one-half inches to the left of the median line, through the sixth intercostal space, touching the lower part of the pericardial sac, through the diaphragm, through the spleen, cutting it almost in two, through the diaphragm, through the lower border of the lobe of the left lung, passing out about six inches to the left side. The course of the bullets was to the left outward and slightly down. (Tr. pp. 65-66.)

The company assumed the burden of proof at the trial, and in its case in chief introduced in

evidence an envelope which had been put in evidence at an inquest held before a coroner's jury and which had been filed in the ofice of the Clerk of the State District Court as an exhibit and a part of the official report of the Coroner of the inquest, and also introduced in evidence some questions put to Mrs. Mason at that inquest and answers given them by her. These statements had to do with the identification of the envelope, the finding of the money in it, and the amount of the money, and some statements attributed by her to the deceased. The testimony before the coroner's jury had been taken down by the official stenographer of the court and county. His longhand transcript accompanied and was made a part of the coroner's report. The coroner's report, including this transcript and the exhibits, was produced at the trial in this case by the Clerk of the State District Court, who was, as stated, the official custodian thereof. Mrs. Mason was not put upon the stand at the trial of this case by the defendant company. She was put upon the stand as a witness in her own behalf. Objection was made on the ground of incompetency, to testimony by her of communications to her by the deceased, or of transactions with him. The grounds of incompetency stated were, in effect, that under the statutes of the state, she could not be a witness to transactions with or oral communications from a person who, at the time of the trial was deceased, and also that she could not be allowed

to testify to alleged communications to her from her husband.

The allowance of her testimony is one of the errors relied upon in this appeal. It would seem more convenient to deal with that *in extenso,* as well as with other errors alleged, when we come to the specifications and the argument. The specifications have to do with admission of evidence offered by the plaintiff below.

SPECIFICATION OF ERRORS

I.

The court erred in overruling the objection of the defendant to the testimony of the plaintiff regarding transactions between herself and the deceased and statements made to her by the deceased, as follows:

The plaintiff, Mrs. Mason, having been sworn as a witness in her own behalf was asked to state when he, the deceased, had got up on the day of his death. She answered the question, and, without any further question being put to her, proceeded to refer to a statement that the deceased had made to her in which mention was said to have been made to a gun. Thereupon the following question was put to her:

"Q. Now, the gun,—what did you mean by 'he would get the gun'?"

"A. I had asked him to get the gun—"

Thereupon, the following objection was inter-

posed and ruling made thereon as hereinafter stated:

"MR. SCALLON.—One moment, please. We object to oral communications between these parties, on the ground the witness is incompetent to testify to the same, first, because she was the wife of the deceased and, second, because she is a party to the suit, and, regardless of marital relations, the communications would be between a party to a suit and a deceased person, and therefore, doubly incompetent. We refer to, and your Honor of course is familiar with, the provision of the law relating to married people, and in addition to that, if your Honor please, in the Act passed in February, 1913, there occur a fourth subdivision, together with the introductory sentence, reads as follows:

" 'The following persons cannot be witnesses: Parties or Assignors of parties to an action or proceding, or persons in whose behalf an action or proceding is prosecuted against any person or corporation, as to the facts of direct transactions or oral communication between the proposed witness and the deceased, or the deceased agent, of such person or corporation, and between such proposed witness and any deceased officer of such corporation.' The statute, as your Honor will see, introduces a disqualification that had not formerly obtained under the Mon-

tana statute, by introducing that subdivision four. It happens, if your Honor please, that the statute is not correctly printed in the official edition of 1913. In supplement published by Bancroft-Whitney it is substantially complete, but not absolutely so; there is an absence of a comma and the absence of the article 'the'. I have here a certified copy of the law.

THE COURT.—Has this law been construed by the courts?

MR. SCALLON.—Not that I know of.

(After a recess,)

THE COURT.—I am of the opinion that this new enactment of 1913 has no application to a case such as that now before the Court. There are two or three words in it that render it somewhat ambiguous and somewhat confusing, but I am of the opinion that it relates to a case wherein the defendant person is deceased, or the agent of the defendant is deceased, or the agent of a corporation or the officer of a corporation is deceased, where the witness about to testify purports to testify to evidence happening with that deceased person. This is not such a case to which the law is designed to apply. The defendant, no agent or officer, is involved; simply a statement of a witness and party's deceased husband to her. Now, as to

the provision of the law that no husband nor wife, without the consent of the other, can be examined as to any communication made by one to the other during marriage, of course that law is designed for a good purpose, supposed to be better for the peace and happiness of the family and for communities in general that husband and wife be not permitted to testify as to what happened between them, either against the other, or in any other proceeding, unless both are willing. Where one is dead, of course the consent of that person cannot be procured and ordinarily the testimony of the other to what took place between them during the marriage relation, received during the married relation, would be excluded, but in this case the defendant has already introduced some testimony as to what this witness said had taken place between her and her husband in her lifetime, and I am of the opinion that, so far as the defendant will be in position to invoke that rule of law, that they have waived it and can waive it; parties can waive it; they waived it by appealing to those very confidential communications which it is the policy to bar. For instance, they have had witness Silk testify as to what this witness testified to at the coroner's inquest in reference as to what her husband had said to her, and

produced an envelope written by him to her which she had secured. Therefore, for these reasons, the objection, which I believe otherwise would be good, will be overruled.

MR. SCALLON.—Note an exception.

Q. Please read the last question.

MR. SCALLON.—To avoid entering any further objections of record, it may be understood this goes to the whole of this.

THE COURT.—I think so, yes, so far as it touches communications between the witness and deceased husband, private communication." (Tr. pp. 115-118).

Thereupon Mrs. Mason testified as follows:

"A. I had asked him to get the gun because someone had broken in the back door before and someone was around the house that night, and a few days before he promised to get it and he never got it, and that evening I was downtown, baby and I, and I went into the Gerald Cafe and I went in the back box and Mr. Frederickson waited on us and George came in and I asked him if he had seen about getting the gun, and he said, 'No, but I will tonight as soon as Mr. Burns comes in.'

* * * * * * *

Why, he seemed happy; he come back and kissed me and he had been playing with the baby and rolling on the floor with an orange."

The witness then having stated that she had gone down town and had returned home near to four o'clock, and that she heard the deceased calling from the basement:

"Q. What did he say?

"A. He said 'Mae!' (Tr. p. 119.)

* * * * * * *

"A. He said, 'I bought that gun and it shot me twice.' (Tr. p. 120.)

* * * * * * *

—I started to pick the gun up and he grabbed hold of my hand and told me not to touch it, it would shoot me, it shot repeatedly, and he didn't want me to touch it. (Tr. p. 120.)

* * * * * * *

I helped him upstairs * * *."

While in the basement, she testified further that "I asked him how it happened and he said, 'I didn't mean to' ". (Tr. pp. 120-121.)

Then the witness, having testified about the envelope, and having said that the envelope was sitting on the bed, at the head of the bed, she added:

"And he told me to take the money and stick it in my dress. I says, 'Why do you think of money now?' He says, 'If I have to stay in the hospital you will need that money.'

"Q. Did he say when he wrote that note?

"A. Why, he said he tried to get up and he couldn't, and he thought he was dying, so he didn't want to have the money in his pocket and afraid I wouldn't get it, so he took an envelope off the floor, and a trunk at the head of the bed, and he wrote it with a short pencil he had in his pocket to write orders with; the pencil was on the floor." (Tr. pp. 121-122.)

Then the witness stated that somone had tried to pry a screen partly off a window in the house, and that she had told him. Then being asked what evidence there was that that had been done, she said:

"When I told him he said it was the coal cracking in the basement; then he went out and looked and there was a piece of steel about that long (indicating) under the window, and he brought that in, and he was angry and said, 'I am going to get that gun and if someone tries to get in the house, to shoot them.' " (Tr. p. 124.)

Then she was asked:

"Q. What, if anything, had you and Mr. Mason planned to do in the spring of 1919, just prior to his death or about that time?

"A. Why, we were going to sell this home and take the money we had and a few liberty bonds and try to buy a larger place closer in, where we could have a couple of roomers and I wouldn't be afraid to stay alone.

"Q. And for that purpose did he attempt to get any money any place?

"A. That is the reason he sold this stock we had." (Tr. p. 124.)

The following questions were also put to her and answered as follows:

"Q. Mrs. Mason, what do you say that he said about the gun when you went downstairs? I am not sure whether the jury heard that or not.

"A. He told me, 'I bought that gun and it shot me twice,' and he told me not to touch it that it shot repeatedly, that it might shoot me.

"Q. What else, if anything, did he say about it?

"A. He told me he didn't mean to shoot hisself— 'Why would an accident happen like this?'

"Q. Did he say anything about whether or not he was shot seriously?

"A. No, he told me he didn't think he was, when we were in the basement.

"Q. You may state whether or not he said anything to you about—

"A. He told me not to worry, everything would be all right." (Tr. p. 126.)

All of these questions and answers were given in chief.

II.

The Court erred in overruling defendant's ob-

jection to the question put by plaintiff's counsel to plaintiff's witness Frederickson, to-wit:

> "Q. Did he [referring to deceased] about the time Mr. Scallon was asking about him say anything about buying some more property in town?"

which was objected to as immaterial and irrelevant and also as self-serving, to which witness answered, after an explanatory question or two:

> "He said he was going to sell his stocks he had and was going to buy city property with his money from now on." (Tr. pp. 100-101).

III.

The Court erred in overruling the objection to the following question put to the witness Frederickson, to-wit:

> "Did you her anyone ask him [referring to deceased] to purchase a gun?"

which was objected to as immaterial, irrelevant and incompetent, and to which the witness answered:

> "A. Well, I heard Mrs. Mason say one time, 'George, you will have to get me a gun if you want me to stay out at that house'. "

The witness further stated that the deceased stated to the witness that "he would have to get a gun * * * because his wife did not like to stay in the house alone unless she had a gun." (Tr. pp. 101-102).

IV.

The Court erred in overruling the objection of the defendant to the following question put to the witness David, testifying on behalf of the defendant:

> "You may state whether or not he appeared to be wholly ignorant as to the operation of the gun which you showed him [referring to deceased]"

which was objected to as incompetent.

A. "I should say so; yes." (Tr. p. 111.)

ARGUMENT

I.

Errors in Admitting Testimony of Plaintiff Regarding Statements of Deceased.

There was, at the time of the trial, the following statutory provisions in Montana regarding witnesses:

> Section 7891 (as amended by Chapter 41 of laws of 1913):
>
> "The following persons cannot be witnesses.
>
> 1. Those who are of unsound mind at the time of their production for examination.
>
> 2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.
>
> 3. Parties or assignors of parties to an ac-

tion or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person, as to the facts of direct transactions or oral communications between the proposed witness and the deceased, excepting when the executor or administrator first introduces evidence thereof, or when it appears to the court that without the testimony of the witness, injustice will be done.

4. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transactions or oral communication between the proposed witness and the deceased, or the deceased agent, of such person or corporation, and between such proposed witness and any deceased officer of such corporation."

Section 7892:

"Persons in certain relations to parties prohibited.—There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband without his

consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

* * * * * * *"

Subdivision 4 of Section 7891 was added to it in 1913. It so happens that in the printed laws of 1913, some words were omitted from this subdivision 4. The section as quoted is copied from a copy of the act certified by the Secretary of State and which will be submitted with this brief. The court, in passing upon the objections, stated, in effect, that the enactment of 1913 had no application to a case such as that at bar; but as to the communications between husband and wife, the court said that the objections would have been good if the defendant company had not itself waived it by introducing in evidence the statements of Mrs. Mason before the coroner's jury and testified to by the witness Silk.

Inasmuch as the court conceded that the objection resulting from marital relations would have been good except for the waiver, we shall take up that matter first.

We submit that there was not any waiver on the part of the defendant; that the defendant had the absolute right to put in evidence the declarations

of the plaintiff in the case, and that in so far as the envelope referred to was concerned the defendant had a positive right to introduce it in evidence, and, therefore, the defendant waived nothing by putting these matters in evidence.

The envelope, as we have stated, was a public record in the office of the Clerk of the District Court. The transcript of the testimony given at the coroner's inquest was a public document there on file. The statute of Montana provides:

Section 9668:

> "*Testimony in writing, and where filed.*— The testimony of the witness examined before the coroner's jury must be reduced to writing by the coroner, or under his direction, and forthwith filed by him, with the inquisition, in the office of the Clerk of the District court of the County."

The defendant company had nothing to do with the coroner's inquest. It never put Mrs. Mason on the stand, never examined her as a witness. Whether or not it was proper for Mrs. Mason to testify before the coroner's jury to alleged statements of her husband is a matter with which the defendant was not concerned. The envelope itself seems to have been there produced by the person conducting the examination of the witness. How it came into his possession does not appear. For aught that does appear, the envelope may have been obtained originally by the coroner or the county attorney in the course of offi-

cial duty. The witness Silk, who was the official reporter, states that he is not sure who produced the envelope at the hearing; that "it may have been introduced by Mr. Ewald, Deputy County Attorney, who was present that night at the hearing". (Tr. p. 93.) Regarding this envelope the following questions were put to the plaintiff at the coroner's inquest:

"Q. Where was the money?

"A. It was in an envelope sitting on the bed—on the spring.

"Q. Was this the envelope the money was in?

"A. Yes, that is the one." (Tr. pp. 93-94.)

The only other parts of the testimony of Mrs. Mason before the coroner's jury which were put in evidence in this case by the defendant are the following:

"Q. Was it all sealed up?

"A. No, the end was off; it was not sealed.

"Q. This envelope, you say, was on the bed?

"A. It was sitting propped up.

* * * * * * *

He said he had some money in his pocket and he took a pencil and wrote on an envelope on the floor and he says, 'You have another dividend in the Anaconda coming.' "

* * * * * * *

"Q. It was in bills, was it?

"A. Yes.

"Q. $25, he said?

"A. No, $745 in there and a $25 dividend I think. The Anaconda has not paid the last dividend. I think that is the way." (Tr. pp. 94-95.)

It will be noted that all of these extracts from that testimony had to do with the matter of the envelope. From this it would seem that the envelope was exhibited by the person conducting the examination of the witness. If nothing had been written on the envelope, it is clear that no question could arise as to the right to put it in evidence. As stated, however, there were on the envelope written the words "May, there is still a dividend coming from Anaconda".

The question of the admissibility of a written communication from one spouse to the other, which had become a public document, was considered in the case of

Lloyd v. Pennie et al., 50 Fed. 4,

in a decision by the Honorable Mr. Justice Morrow, wherein the cases on the question were reviewed, and wherein it was held, in effect, that there was a positive right on the part of a litigant to put such a document in evidence, and that it was not privileged. The opinion refers to the following cases which support the views therein stated:

State v. Buffington, 20 Kansas 599, 27 Am. Rep. 193;

State v. Hoyt, 47 Conn. 518.

See also

Johnson v. Heald, 33 Md. 352.

If this document was not privileged and if the defendant had the positive right to introduce it in evidence, its right to object to incompetent testimony on the part of the widow cannot be affected or prejudiced. There cannot be any waiver in such a case resulting from the doing of an action which a party has a right to do and which the statute does not interfere with.

Regarding the statements made by Mrs. Mason at the coroner's inquest, the simple fact is that they were declarations made by a party to this suit. It is an invariable rule that declarations by a party to a suit may be proved against him. It is true that these declarations of herself included statements alleged by her or stated by her to have been made to her by the deceased. Those statements by her might or might not have been true. The deceased might or might not have made these statements to her, but she incorporated them in her testimony before the coroner. They become a part of her statements. They were provable against her, because they were part of her statements. It so happens they were made before a coroner's jury. Suppose they had been made to someone else, say, for example, to an agent of the defendant company in a conversation or discussion regarding the death. It seems clear that the whole of the statements made by the plaintiff could be introduced in evidence against her, even

though they purported to include statements by the deceased. Indeed, we may ask, upon what ground could a witness testifying to such statements be required to leave out such portions as purported to be repetitions of statements by deceased, and testify only to the remainder? Or,suppose Mrs. Mason had written a letter to the company or to some other third person, embodying these alleged statements of the deceased, would not such a letter or writing be admissible as a matter of right as against her? No distinction can be drawn between such unofficial statements and those made by her at the coroner's inquest. There is no special circumstance in the case which would, in any manner, have justified their exclusion. There does not seem to have been any compulsion exercised upon her. It is not claimed that her testimony was not purely voluntary, and as we have seen—in so far as the envelope is concerned—it seems to have been at the time of her examination in the possession of the person conducting the examination. There was no advantage taken of her in any manner. So, whether or not special circumstances might, in a possible case, affect the rule, need not be considered, because of their absence in this instance.

We further submit that, properly speaking, there cannot be any question of waiver in this matter, in so far as the defendant is concerned, in connection with the objection to this testimony of the plaintiff in this case. The law declares these

communications between husband and wife inadmissible in evidence on grounds of public policy. Only the spouses themselves can waive. A third party cannot waive. He has nothing to say in the matter.

(Of course, if no objection is made, error may not be alleged but that is a different matter.)

It is respectfully submitted that the doctrine of waiver is not applicable at all. It is estoppel that would have to be invoked. But evidently, there was no ground on which to hold defendant estopped from objecting. How then can any question of waiver or of estoppel be raised in this case?

Here the defendant had a right to introduce on its part the envelope and the statements of the plaintiff herself. Having simply exercised a right, it seems evident that it still has the right to object to incompetent evidence. It is further submitted that, even if there had been a question as to the admissibility of the statements of the plaintiff, the offer of them would work no estoppel. The court let them in. The court makes the rule, not the litigant.

Different considerations would arise if the plaintiff had offered in evidence other but relevant portions (if any) of her testimony at the coroner's inquest. Then another and quite different rule would have come into play, viz., the rule that where a part of a statement or writing has been put in evidence, any other relevant part

may also be put in evidence, but no such offer was or is here involved.

Again, it will be noted that the testimony here objected to was not offered in explanation or denial of plaintiff's previous statements. It was offered as independent, direct and original evidence. It must, therefore, be admissible as a matter of absolute right or it is not admissible at all.

A similar point was presented in

Brown v. Burgett, 61 Hun. 623, 15 N. Y. S. 942,

(a decision in the Appellate Division), affirmed by the Court of Appeals of New York, on the opinion of the court below, in

149 N. Y. 578, 43 N. E. 986.

The evidence of the plaintiff in that case to a transaction had with the deceased had been excluded at the trial on the ground that under the statute of New York, the plaintiff could not be allowed to testify regarding that transaction. It was contended by the plaintiff, however, that the defendant had waived the objection, because the defendant had testified to statements made to him by the plaintiff. There, as here, the statements of the plaintiff so testified to embodied a statement of his own transaction with the deceased. In all essential particulars, a situation exactly similar to that at bar was presented. The plaintiff in that case argued on the appeal to the Appellate Division that:

"The defendant had testified concerning

the same transaction, and so had opened the door to the testimony of the plaintiff in respect thereto."

The court disposed of the argument by saying:

"The argument is already answered by showing that the defendant had not testified to the transaction itself, but only to the plaintiff's admissions as to what the transaction was."

The statute of New York considered in that case was as follows:

Section 829, Code of Civil Procedure:

"Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee or person so deriving ti-

tle or interest is examined in his behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof."

(Vol. 12 Encyclopaedia of Evidence, page 712.)

The Statute of 1913

Thus far we have treated the subject from the standpoint of communications between husband and wife. We now come to the other statutory disqualifications. We note that the alleged "waiver" spoken of by the court below, had no relation to the right to invoke the provision. Subdivision 4 of the Act of 1913 amending Section 7891, quoted above, seems clearly intended to prevent a party testifying to transactions with a deceased person. The terms are very broad. It does not, like subdivision 3 of the same section, apply merely to the case where the adverse party is a representative of the deceased, but to any case of a transaction with a deceased person.

The transactions here testified to by the plaintiff were, of course, put in to sustain her claim against the defendant. If competent, they were material to the controversy. The theory of the statute

clearly seems to be that a party to a suit shall not be allowed the undue advantage of relating transactions with a dead person. The words "transactions between the proposed witness and the deceased person" cannot be limited in such manner as to restrict their application to predecessors in interest of parties in suits. The words "parties or assignors of parties to a suit against *any person or corporation*" also show that the words "the deceased person" are intended to apply to any deceased person. The definite article "the" is used where possibly the indefinite article "a" would have been more appropriate, but the meaning is the same. It cannot be any different. The reference is to transactions between the proposed witness and a deceased person. It is not possible to limit the application of paragraph 4 of a case where the opposite party is a successor in interest of a deceased. That could not be done without adding words to the statute, the addition of which would be equivalent to legislation. Moreover, such a construction would be inconsistent with the express provisions relating to transactions with a deceased *agent* of a person or corporation. Here the person or corporation was the principal and not a representative or successor, and the deceased merely the agent and not a predecessor.

It has been so held in Minnesota in the case of

Pitzl v. Winter, 96 Minn. 499, 105 N. W. 673, 5 L. R. A. (New Series) 1009,

under a statute reading as follows:

> "It shall not be competent for any party to an action, or any person interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or person relative to any matter at issue between the parties, unless the testimony of such deceased or insane person concerning such conversation or admission, given before his death or insanity, has been preserved, and can be produced in evidence by the opposite party, and then only in respect to the conversation or admission to which such testimony relates."

This is copied from Encyclopaedia of Evidence, Vol, 12, page 710. It will be noticed that the number of the section in the Revised Laws of Minnesota of 1905 differs from that given in the opinion in which reference is made to the statute of 1894 wherein the section was designated as 5660, but the wording is identical, as may be seen upon reference to the case of Bower v. Schuler, 55 N. W. 817. It is stated in that decision that the exclusion is the result of a "growth", or gradual additions.

The Minnesota statute just quoted and the statutes to be referred to below show that Montana does not stand alone in the matter of these regulations, for these other statutes are as broad and one of them even broader than ours. In Nevada they have a statute reading as follows:

"All persons, without exception, otherwise than as specified in this chapter, who have organs of sense, can perceive and perceiving can make known their perceptions to others, may be witnesses in any action or proceeding of any court of this state. Facts which, by the common law, would cause the exclusion of witnesses may still be shown for the purpose of affecting their credibility. No person shall be allowed to testify:

1. When the other party to the transaction is dead * * *".

Another paragraph provides for disqualifications in suits against an estate, etc. (Rev. Statutes of 1912, sec. 5419). In

Forsyth v. Heward, 41 Nev. 305; 170 Pac. 21,

where the plaintiff sued the executor of an estate and others, alleging that he, the plaintiff, had been adopted by the deceased and her husband, two witnesses, namely, the father and mother of the plaintiff, were held incompetent under that statute to testify to either statements or acts of the deceased.

There, the witnesses excluded were not even parties to the suit. It may be worth noting that a provision similar in effect, though different in words, had been in force in Nevada at an early period, and was pased upon by the Supreme Court of that state in

Roney v. Buckland, 4 Nev. 45, 58;

that it was afterwards changed, either unwittingly or by design, so that the rule for a time was held to have been modified, as may be seen in the report of the case of Crane, Hastings & Co., v. Gloster, 13 Nev. 279, but the provision was afterwards restored in even a more clear and definite manner. It may also be noted that the old provision was spoken of very favorably by Chief Justice Beattie in Crane, Hastings & Co. v. Gloster, just mentioned.

So, in Kentucky, there is a statute, the pertinent provisions of which are as follows:

> "Subject to the provisions of subsection 7 of this section, no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, an infant under fourteen years of age, or by one who is of unsound mind or dead when the testimony is offered to be given except for the purpose, and to the extent, of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted, unless—a. The infant or his guardian shall have testified against such person, with reference to such statement, transaction or act; or, b. The person of unsound mind shall, when of sound mind, have testified against such person, with reference thereto;

or, c. The decedent, or a representative of, or some one interested in, his estate, shall have testified against such person, with reference thereto; or, d. An agent of the decedent or person of unsound mind, with reference to such act or transaction, shall have testified against such person, with reference thereto, or be living when such person offers to testify, with reference thereto."

That statute has been applied in a case where a judgment debtor claimed to have paid to a sheriff, who was holding an execution, and to a deputy of a sheriff, the amount of the judgment, both sheriff and deputy being dead. The judgment debtor, who was defending against the judgment creditor who had purchased real property at a sheriff's sale, was held incompetent to prove payment.

Gaar, Scott & Co. v. Reesor, (Ky.) 91 S. W. 717.

Other illustrations of applications, similar in essential particulars for which we are contending, will be found in

Trail v. Turner, (Ky.) 56 S. W. 645;
Girdner v. Girdner, (Ky.) 32 S. W. 266;
Helton v. Asher, (Ky.) 46 S. W. 22.

It is submitted that the evidence was incompetent.

II.

Errors in the Admission of Testimony by the witness Frederickson.

Specifications No. II and III.

This witness was put upon the stand by the plaintiff and testified to the relations between the plaintiff and the deceased. He was a friend of theirs. He testified in chief regarding the disposition of the deceased and his relations with his family, seemingly, for the purpose of showing absence of motive to commit suicide. On cross-examination, he was asked regarding a trip made by deceased to California and about the condition of the health of the deceased. On re-examination, he was asked:

> "Did he about the time Mr. Scallon was asking about him say anything about buying some property in town?"

This was objected to as immaterial and irrelevant, and also as self-serving. The objection having been overruled, the witness testified:

> "He said he was going to sell his stocks he had and was going to buy city property with his money from now on;"

and that deceased had made that statement after his return from California just a few days prior to his death. Immediately following that, he further stated, in answer to another question:

> "He said he might sell the old home and build a home closer in on account of his wife

didn't want to stay out there alone, it was too far out."

In overruling the objection, which was on the ground that the evidence was immaterial, irrelevant, and also self-serving, the court said:

> "No, I think not under the circumstances; he has asked for circumstances covering the same period. I think he may state any others that he knows that might bear an inference of expectation of continued life, if it bears such. For the jury; the objection will be overruled." (Tr. pp. 100-101.)

It is submitted that these alleged statements of deceased were inadmissible. If they were to be held admissible, any self-serving declaration could be put in evidence.

Again, the witness was asked whether he had heard anyone ask the deceased to purchase a gun. The court overruled the objection stating:

> "As the Court has said before, it may furnish a circumstance. If there is any room for inference that he bought the gun for suicidal purposes I think it would be permitted to show that he bought it for other purposes."

The witness thereupon testified that he had heard Mrs. Mason at one time say to him, " George, you will have to get me a gun if you want me to stay out at that house." (Tr. pp. 101, 102). And that the deceased had said to the witness that he would have to have a gun because his wife did not like to

stay in the house alone, unless she had a gun. (Tr. p. 102.)

These are also self-serving.

Self-serving declarations are not admissible.

Rulofson vs. Billings, 140 Cal. 452, 74 Pac. 35;

Spellman vs. Rhode, 33 Mont. 21, 26.

III.

Specification IV.

The witness David was allowed over objection to answer the following question:

> "You may state whether or not he appeared to be wholly ignorant as to the operation of the gun which you showed him?"

to which he answered:

> "A. I should say so, yes." (Tr. p. 111.)

It is submitted that opinion evidence was not competent as to such a matter. The witness could have detailed what deceased did, but not give his opinion. That is not within the provisions allowing opinion evidence.

Code of Civil Procedure of Montana, Sec. 7887.

This section, subdivisions 9 and 10, specifies the cases where opinion evidence may be given, viz:

> "9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwrit-

ing; his opinion of a question or science, art or trade, when he is skilled therein.

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of intimate acquaintanceship respecting the mental sanity of a person, the reason for the opinion being given."

It is respectfully submitted that the judgment herein should be reversed and the cause remanded for a new trial.

Respectfully submitted,

WALSH, NOLAN & SCALLON
FLETCHER MADDOX
Attorneys for Plaintiff in Error.

No. 3523

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEW YORK LIFE INSURANCE COMPANY,
A CORPORATION,

Plaintiff in Error.

vs.

EVELYN E. MASON,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

GEO. A. JUDSON,
H. R. EICKEMEYER,
Attorneys for Defendant in Error.

Filed ....., 1921

....., Clerk.

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QUESTIONS TO BE ARGUED.

There are, as stated by Plaintiff in Error, but four questions to be argued:

(1) Did the Court err in overruling the objection of the defendant to the testimony of Plaintiff regarding transactions and oral communications between herself and her deceased husband?

(2) Did the Court err in overruling defendant's objection to the question put by Plaintiff's counsel to Plaintiff's witness Frederickson, to-wit: "Did he (referring to deceased) about the time Mr. Scallon was asking about him say anything about buying some more

property in town?" Which was objected to as immaterial and irrelevant and also as self-serving; to which witness answered after an explanatory question or two, "He said he was going to sell his stocks he had and was going to buy city property with his money from now on." (Tr. pp. 100-101.)

(3) Did the Court err in overruling the objection to the following question put to the witness, Frederickson, to-wit: "Did you hear anyone ask him (referring to deceased) to purchase a gun?" which was objected to as immaterial, irrelevant, and incompetent, and to which the witness answered, "Well, I heard Mrs. Mason say one time, 'George, you will have to get me a gun if you want me to stay out at that house.'" (Tr. pp. 101-102.)

(4) Did the Court err in overruling the objection of defendant to the following question put to the witness, David, testifying on behalf of the defendant, "You may state whether or not he appeared to be wholly ignorant as to the operation of the gun which you showed him?" (referring to deceased), which was objected to as incompetent. A. "I should say so, yes." (Tr. p. 111.)

ARGUMENT.

I.

There was no error in admitting testimony of Plaintiff regarding statements of her deceased husband.

As stated by Plaintiff in error, there was at the time of the trial in this cause, the statutory provisions in Montana relating to the testimony of the husband and wife.

However, it is contended by defendant in error that those provisions did not prohibit her from testifying to the particular transactions and oral communications made to her by her deceased husband. (Tr. pp. 115-126.)

It is contended by the defendant in error that the testimony given on the part of the defendant in error and here assigned as error by defendant below, was admissible in this case and that no waiver was necessary in order that Plaintiff below might testify to the statements made to her by her deceased husband.

The testimony given by the defendant in error as to transactions with her deceased husband was not privileged.

There are four fundamental conditions necessary to the establishment of a privilege against the disclosure of transactions and communications between husband and wife. These four fundamental conditions are: (1) The communications must originate in a confidence that they will not be disclosed; (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) The relation must be one in which the opinion of the community should be seduously fostered; (4) The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation. A privilege should be recognized when these four conditions are present and not otherwise. Accordingly the rule of privileged communications does not affect the general competency

of any witness, but merely renders him incompetent to testify to certain particular matters.

40 Cyc. P. 2353.
Wigmore on Evidence Vol. IV Sec. 2285.

The testimony given by the defendant in error and complained of by the Plaintiff in error is in substance as follows: "I had asked him to get the gun because someone had broken in the back door before and someone was around the house that night, and a few days before he promised to get it and he never got it, and that evening I was down town, baby and I, and I went into the Gerald Cafe and I went in the back box and Mr. Frederickson waited on us and George came in and I asked him if he had seen about getting the gun, and he said, 'No, but I will tonight as soon as Mr. Burns comes in. He is the sheriff. Why he was going to get a permit to get the gun. He went down town. Why, he seemed happy; he came back and kissed me and he had been playing with the baby and rolling on the floor with an orange." The witness then stated that she had gone down town and returned home near four o'clock, and that she heard the deceased calling from the basement. "He said, 'Mae, Mae!' (Tr. pp. 118-119.) "He said, 'I bought that gun and it shot me twice.' I started to pick up the gun and he grabbed hold of my hand and told me not to touch it, it would shoot me, it shot repeatedly, and he didn't want me to touch it." (T. p. 120.) "I helped him upstairs. I asked him how it happened and he said, 'I didn't mean to.'" (Tr. p. 120-121.) "The envelope was sitting on the bed at the head of the bed, and he told me to take the money and stick

it in my dress. I says, 'Why do you think of money now?' He says, 'If I have to stay in the hospital you will need that money.'" "Why, he said he tried to get up and he couldn't, and he thought he was dying, so he didn't want to leave the money in his pocket and afraid I wouldn't get it, so he took an envelope off the floor, and a trunk at the head of the bed, and he wrote it with a short pencil he had in his pocket to write orders with; the pencil was on the floor." (Tr. pp. 121-122). "Someone tried to pry a screen partly off a window in the house. When I told him, he said it was the coal cracking in the basement; then he went out and looked and there was a piece of steel about that long (indicating) under the window, and he brought that in, and he was angry and said, "I am going to get that gun and if someone tries to get in the house, to shoot them." (Tr. p. 124.) "We were going to sell this home and take the money we had and a few liberty bonds and try to buy a house closer in where we could have a couple of roomers and I wouldn't be afraid to stay alone. That is the reason he sold this stock we had." (Tr. p. 124.) "He told me, 'I bought that gun and it shot me twice,' and he told me not to touch it that it shot repeatedly; that it might shoot me; he told me he didn't mean to shoot hisself. 'Why would an accident happen like this?' He told me he didn't think he was shot seriously when we were in the basement. He told me not to worry, everything would be all right." (Tr. p. 126.)

It is clear that these statements by the husband to the wife do not come within the rules including testi-

mony as privileged, because they are not of a confidential nature, and it was not intended by the deceased that they should not be disclosed. This for example is clearly shown by the statement of the deceased husband made to the witness, Mrs. Lottie Burnhart: "I saw George Mason on the day of his death, after he was injured and before he died. I talked to him that day and he said he didn't mean to do it****. When Durnin stepped out of the way, I stepped up to the bed side and asked him what in the world had happened, and he said, 'Lottie, I didn't mean it.' Mae commenced to cry and we both talked and he repeated the same words to her, that he didn't mean it, and then he commenced about the baby." (Tr. pp. 140-141.)

Also disclosures made to the witness, Frederickson, who testified in part, as follows: "He said (referring to deceased) that he was going to sell his stock he had and was going to buy city property with his money from now on. He made that statement to me after he came back from California, just a few days prior to his death. He said he might sell the old home and build a home closer in on account of his wife didn't want to stay out there alone, it was too far out; that was just a few days before his death." Do you know anything about him purchasing a gun? "I did. He has told me. Well, I heard Mrs. Mason say one time, 'George, you will have to get me a gun if you want me to stay out at that house.' That was close to the time of his death after he came back from California. She was eating in the Gerald Cafe at that time. It was a day or two before his death. He stated to me

that he would have to get a gun because his wife did not like to stay in the house alone unless she had a gun. There was some people tried to break in the house at the time they was away to California." (Tr. pp. 100-102.)

Also disclosures made to the witness Durnin, who testified in substance, as follows: "He said (referring to deceased) 'I did it myself. I shot myself twice.'" (Tr. p. 69.)

Wigmore says, "The intended transmission of the communication to a third person will negative a marital confidence."

Wigmore on Evidence Vol. IV Sec. 2336, p. 3262.

It is clear that these statements were made to the wife not in marital confidence, but with the intent to be by her communicated to others. It is clear that it must have been the intention and the wish of the husband that these statements so made to his wife be communicated to others to explain his death. They were not privileged. They were in no sense privileged or made in confidence to the wife.

Wigmore says that if the communication is not intended to be a secret one, the privilege has no application to it.

Wigmore on Evidence, Vol IV. Sec. 2336.

In 1833, Daniel, J., in Hester vs. Hester, 4 Dev. 228,230, held: "The sanctity of such (confidential) communication will be protected. Persons connected by marriage tie have, as was said at the bar, the right to think aloud in the presence of each other. But the

question remains, what communications are to be deemed confidential? Not those, we think, which are made to the wife to be by her communicated to others; nor those which the husband makes to the wife as to a matter of fact upon which a thing is to operate after his death, when it must be the wish of the husband that the operation should be according to the truth of the fact as established by his declaration. Suppose a husband to disclose to his wife that he has given to one of their children a horse, can she not after his death prove that as against the executor? . . . The same reason equally applies when from the subject of the conversation it is obvious he did not wish it concealed, but on the contrary must have desired to make it known, and through her, if he found no other means of doing so."

In 1872, Sargent, J., in Clements vs. Marston 52 N. H. 31, 38, held: "Allowing the wife to testify for or against her husband in any case where a stranger would have been a competent witness, seems to be the rule now; and, in view of the case, nothing should be excluded except something that is strictly confidential, and not only so but communicated in strict marital confidence."

In 1879, Green, President, in White v. Perry, 14 W. Va. 66,80, held: "When there is not even a seeming confidence, when the act done or declaration made by the husband, so far from being private or confidential is designedly public at the time, and from its nature must have been intended to be afterwards public, there is no interest of the marriage relation or of society

which in the absence of all interest of the husband or wife requires the latter to be precluded from testifying between other parties to such act or declaration not affecting the character or person of her husband." Many other cases cited under the section in Wigmore just mentioned, follow these.

The Washington statute as to communications between husband and wife, which is identical with that of the State of Montana, was construed in the case of Sackman et al. v. Thomas et al. 64 Pac. 819, in which it was held, "That the testimony of a married woman that the property in controversy was purchased in part with money given to her by her husband, was not inadmissible as a communication between the husband and wife, since the statute refers only to confidential communications induced by the marriage relation and not to conversation in regard to business transactions."

Also see State vs. Snyder, 147 Pac. 38;
King vs. Sassaman, 64 S. W. 937;
Giddings et al vs. Iowa Saving Bank of Ruthven, 74 N. W. 21;
German-American Ins. Co., vs. Paul, 53 S. W. 442;
Renshaw vs. First Natl. Bank, Tulhoma, 63 S. W. 194;
Ward vs. Oliver et al 88 N. W. 631;
Stickney et al vs. Stickney, 131 U. S. 227-240, 33 Law Ed. 136;
Jacobs vs. U. S. 161 Fed. 694.

Communications or transactions between husband and wife in respect to purely business matters are not privileged.

40 Cyc 2355
Also see cases cited thereunder.

It has been considered that the rule of privilege does not exclude testimony by one spouse as to declaration or act of the other showing affection or the loss or absence thereof.

40 Cyc 2356 (3)

One spouse is competent to testify as to dying declarations of the other.

40 Cyc 2356 (6)

Even though the testimony included (and this we do not admit) statements of a confidential nature, they could not be excluded for the reason that the deceased himself made the same statements to third parties or in the presence of third parties.

Chamberlayne says: "The rules frequently stated that divorce does not remove the disability and that death does * * * In most of the cases cited in support of the testimony of the survivor, it will be found that the witness was called on behalf of the estate of the heirs of the deceased, and that they may so testify seems to be a generally accepted doctrine."

Chamberlayne on Evidence, Vol. V. Sec. 3662;
Also see cases cited thereunder.

Wigmore, says: "If the one spouse is deceased, the other spouse is qualified to testify on behalf of the estate; the heirs or any persons succeeding to the deceased's interests; because there is no living person interested to whom the witness bears the relation of spouse. The reason is thus not that "those feelings

and influences supposed to exist during the conjugal state, have ceased," for they are quite as likely to remain; but merely that the rule of thumb founded on that supposed bias (Ante Sec. 603) has ceased to be applicable."

Wigmore on Evidence, Vol. 1, Sec. 610.

Rogers, J., in Cornell vs. Vanartsdalen, 4 Pa. St. 364, 374, held: "It is somewhat difficult to understand how the point can arise, when her testimony is offered in favor on either of the former husband or of his estate after his death. She may have a strong bias, it is true, but that goes to her credit and not to her competency. But in what respect public policy arising from the domestic relation forbids her to testify is not apparent to my mind."

Wigmore on Evidence, Vol. 1, Sec. 610;
Also see cases cited thereunder.

The statutory prohibition of testimony by husband or wife as to "any communication by one to the other" applies only to the knowledge which one obtains from the other, which but for the relation between them, would not have been communicated or which is of such a nature or character that to relate it, would tend unduly to embarrass or disturb the parties in their marital relations.

Sexton vs. Sexton (Iowa) 105 N. W. 314;
L. R. A. Vol. II, New Series 708.
Also cases cited in the note thereunder.

We cannot find that the Subdivision of the Section of the Montana Statute relating to communications between husband and wife has been construed by the Supreme Court of this State But we do find that

Subdivision 2 of the same section relating to privileged communications between attorney and client has been construed in the case of Lenahan vs. Casey. Subdivision 1, by its terms, excludes any communication made by one spouse to the other, and Subdivision 2, by its terms, excludes any communication made by a client to his attorney. In construing Subdivision 2, our Court held: "The purpose of the rule making communication by a client to his attorney privileged being to enable the former to make confidential disclosures to the latter without fear of publication; it has no application where no such disclosures have been made; therefore testimony of an attorney that though he had consulted with defendant relative to a receivership proceeding arising out of the affairs of a partnership, a suit for the dissolution of which was then on trial, his client had never informed him that he had purchased plaintiff's interest in the firm as he then claimed, was properly admitted."

Lenahan vs. Casey, 46 Mont. 367, 128 Pac. 601.

By the above ruling, it is apparent that our Supreme Court holds, like the Supreme Court of Washington holds on identical laws, that the term "any communication" means confidential communications or such communications made with the express intention of keeping such statements or information strictly secret.

The statements and testimony of the Plaintiff below, which are contained in the Specifications of Error of the Plaintiff in error, are manifestly not of such a nature.

Because of the fact that in the case at bar, the defense is suicide, motive or lack of motive is a very essential element. There is a strong presumption of law against suicide.

Neashman vs. N. Y. Life. Ins. Co., 244 Fed. 556

The statement and testimony of the Plaintiff below as to statements and transactions with her deceased husband are all statements and transactions which were a part of the res gestae and are competent facts explaining the cause of the death of deceased husband of plaintiff below.

34 Cyc. 1642
Car vs. State, 43 Ark. 99, 103

THE STATUTE OF 1913

The Court did not err in permitting the Plaintiff below to testify to the transactions and statements of her deceased husband to her over the second purported ground of objection made by the defendant below, namely, that Section (4) of Chapter 41 of the Laws of Montana, 1913, prohibited her from so testifying. The Section (4) referred to in this chapter was printed as follows in the official Session Laws of Montana, 1913:

> "Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the fact of direct transaction or oral communication between the proposed witness and the deceased agent of such person or corporation, and between such proposed witness and any deceased officer of such corporation."

The Plaintiff in error contends that the law as passed was as follows:

> "The following persons cannot be witnesses: Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against any person or corporation as to the facts of direct transactions or oral communication between the proposed witness and the deceased, or the deceased agent, of such person or corporation, and between such proposed witness and any deceased officer of such corporation."

Judge Bourquin, in overruling the motion made by defendant below, to exclude the testimony of the plaintiff below as to transactions on behalf of her deceased husband, stated:

> "I am of the opinion that this new enactment of 1913, has no application to a case such as that now before the Court. There are two or three words in it that render it somewhat ambiguous and somewhat confusing, but I am of the opinion that it relates to a case wherein the defendant person is deceased, or the agent of the defendant is deceased, or the agent of a corporation or the officer of a corporation is deceased, where the witness about to testify purports to testify to evidence happening with that deceased person. This is not such a case to which the law is designed to apply. The defendant, no agent or officer, is involved; simply a statement of a witness and party's deceased husband to her."

This section of the Statute has never been construed by the Supreme Court of the State of Montana, and we have very carefully examined all of the statutes of the different states and failed to find any that have a law identical to the law as submitted by the defendant in error. We have also carefully examined the cases cited by the Plaintiff in error in its Brief and cannot find in any of the cases cited anything that throws any light upon this particular stat-

ute; all of the cases cited construe an entirely different law.

WAIVER

The question of Waiver in the determination of the matter before the Court, is not material and has no application for the reason that it has been clearly shown by the law heretofore cited that the evidence objected to by the Plaintiff in error is clearly competent regardless of the question of Waiver.

II.

Questions (2) and (3) will be Treated Together

The evidence testified to by the witness Frederickson and objected to by the Plaintiff in Error was given on re-direct examination and covered a period of time enquired about by defendant below, and transactions enquired into by the defendant below on cross examination. This testimony was offered on behalf of the plaintiff below for the purpose of showing that there was no motive for suicide and that deceased had an expectation of continuing life. These statements were not self-serving. Neither the deceased nor his successors in interest were parties to this suit. The evidence was simply statements of circumstances related by deceased to third persons.

The cases cited by Plaintiff in Error are not in point.

The case of Spellman vs. Rhodes, 33 Mont. 21,26, referred to statements made by one party to the suit to a third person and the other case Rulofson vs. Billings, 140 Cal. 452, 74 Pac. 35, refers to statements

made by a deceased party whose successors in interest were parties to the suit.

The statements of deceased, testified to by the witness Frederickson, were all competent to show motive or lack of motive.

The trial Judge, being familiar with all of the facts and circumstances in the case and with the previous examination of the witness Frederickson by the defendant below in the exercise of his judicial discretion, so that fairness and justice might be attained, permitted the evidence to be given by this witness so that the jury might be thereby aided in arriving at a correct determination of the case. This is clearly shown by the statements of the trial Judge at the time he overruled the objections of defendant below to the testimony of the witness Frederickson. Part of the testimony quoted in Plaintiff in Error's Specifications of Error II and III was objected to as being immaterial, irrelevant, and also as self-serving. The Court said, "No, I think not under the circumstances; he has asked for circumstances covering the same period. I think he may state any others that he knows that might bear an inference of expectation of continued life, if it bears such. For the jury; the objection will be overruled." (Tr. p. 100.)

The plaintiff in error later objected to the same kind of evidence as immaterial, irrelevant and also as incompetent, and the Court held: "As the Court has said before it may furnish a circumstance. If there is any room for inference that he bought the gun for suicidal purposes I think it would be permitted to show

that he bought it for other purposes. The objection will be overruled." (Tr. p. 101.)

At this point, we might call attention to the fact that there was no objection entered on the part of the defendant below to the testimony quoted as error in the last paragraph of Specification III, page 14 of the Brief of Plaintiff in Error and the objection to such testimony was thereby waived. The testimony of the witness, Frederickson, objected to by the defendant below, was also competent as a part of the res gestae.

34 Cyc. 1642
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III.

QUESTION (4).

The Plaintiff in Error complains that the Court erred in permitting the witness, David, to answer over objection, the following question: "Q. You may state whether or not he appeared to be wholly ignorant as to the operation of the gun which you showed him? A. I should say so; yes." To which the defendant below objected to as incompetent. (Tr. p. 111.) It is now claimed by the Plaintiff in Error that this question called for opinion evidence and that on that account is error. If such were the case (which we do not concede) the defendant in error waived its admission by not interposing the proper objection at the time. (See Tr. p. 111.)

There could be no error in permitting the witness, David, to answer the question complained of, because he showed in his testimony given previous to the ruling

complained of, and thereafter on cross examination, that the deceased was wholly ignorant as to the operation of the gun in question. (Tr. pp. 111-112.)

Plaintiff in Error at the time should have made a specific objection to the evidence complained of on the ground that it called for an opinion of the witness. No such objection was made and it cannot now complain that the ruling in question was error.

Corpus Juris says:

> "When an objection is made, the trial court and opposing counsel are entitled to know the ground on which it is based, so that the court may make its ruling understandingly, and so that the objection may be obviated, if possible; and therefore, as a general rule, objections, whether made by motion or otherwise, and whether to the pleadings, to the evidence, to the instructions or failure to instruct, to the argument of counsel, to the verdict, findings, or judgment, or to other matters, must, in order to preserve questions for review, be specific and point out the ground or grounds relied upon, and a mere general objection is not sufficient. The appellate court will not review a question not raised in the court below with sufficient definiteness to make it clear that there was no misunderstanding of the point ruled on. And, where a wrong reason is assigned for an objection, it is the same as if there was no objection at all.
>
> 3 C. J. 746, Par. 639;
> See cases cited thereunder;
> Also Pullen vs. City of Butte, 121 Pac. 878.

We therefore contend that the Court did not err in any of its rulings alleged in the Specifications of Error submitted by the Plaintiff in Error.

It is accordingly respectfully submitted that the

trial Court's rulings were correct and that the judgment should be affirmed with costs to the Defendant in Error.

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No. 3523

United States
Circuit Court of Appeals
For the Ninth Circuit.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

EVELYN E. MASON,

Defendant in Error.

REPLY BRIEF.

FLETCHER MADDOX,
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Attorneys for Plaintiff in Error.

STATE PUBLISHING CO., HELENA, MONT.

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REPLY BRIEF.

As we could not anticipate what questions the defendant in error would raise in her brief, we did not in our brief discuss the principle of *res gestae* declarations. Pursuant to permission granted, we file this memorandum brief to discuss briefly the subjects referred to and which have received some consideration in the brief of the defendant in error.

RES GESTAE DECLARATIONS.

It is suggested that the statements which were made by Mr. Mason to his wife upon her return to the house were a portion of the *res gestae* of the shooting, and, therefore, admissible. This propo-

sition is urged now for the first time, and, seemingly, without any discussion. The subject receives in the brief of the defendant in error only the tribute of a passing glance. We do not dispute the universal application of the rule that *res gestae* declarations are competent. The important question is, are the declarations to which reference is made of that character?

What are such declarations is a matter that has been considered frequently by the Supreme Court of Montana, and we take the liberty of setting forth their essential requirements as declared by that tribunal.

The statements of a driver of a stage coach just after the accident that it would not have occurred had he been watching were not binding on the stage company.

Ryan v. Gilmer, 2 Mont. 517.
Territory v. Clayton, 8 Mont. 1.

Self-serving declarations of plaintiff in an action for personal injuries sustained in being run over by a freight train on which he was riding without paying fare, to the effect that he had been pushed off by a brakemen held not part of the *res gestae,* but mere narratives of a past transaction, and, therefore, properly excluded.

Hulse v. Northern Pacific Ry. Co., 47 Mont. 59.

The statement by a section foreman that an animal was struck by a train and that he afterwards

killed it, is not a part of the *res gestae,* because it was not part of the accident, nor did it spring as a spontaneous voluntary statement induced by the accident.

Poindexter & Orr Livestock Co. v. Ore. Short Line R. R. Co., 33 Mont. 338.

While declarations to be admissible as part of the *res gestae* need not have been strictly contemporaneous with the main incident which gave rise to them, they must have been made while the mind of the speaker was laboring under the excitement aroused by the incident before there was time to reflect and fabricate.

Callahan v. C. B. & Q. Ry. Co., 47 Mont. 401.

See also:

Heckle v. Southern Pacific Ry., 56 Pac. p. 56

An inspection of all of the cases will disclose that in order to make a statement a *res gestae* declaration, the event or occurrence itself must be, as it were, speaking through the party, and the declaration must be the spontaneous voluntary statement induced by the event, and not a narrative of what has already transpired. It seems, likewise, to be a necessary factor in the makeup of such a declaration that the element of deliberation should not exist. Tested by these requirements, the statements under consideration are lacking in essential elements to relieve them of the characteristics of hearsay evidence.

In the case under consideration, we have be-

fore us conduct showing deliberate planning, such as the placing of the money in the envelope, the mental operation of giving directions as to a money dividend payable in stock, and the placing of the envelope in such a manner that it could be readily seen, all followed by such a delay as occurred until the advent of the wife on the scene and all of them so removed from the shooting as to exclude the idea that they were a portion thereof.

But, assuming that they were *res gestae* declarations and admissible as such, still the incompetency of the wife as a witness would render them inadmissible through her. Others, against whom the ban of incompetency did not exist, might testify to them ,assuming that they are *res gestae* declarations, but the statutory provisions which render the wife incompetent as a witness make no distinction between *res gestae* declarations and other declarations. It makes no difference what the communication is, she is rendered incompetent to testify regarding same.

Humphrey v. Pope, 82 Pac. 223.

WIFE'S TESTIMONY.

It will be noticed that the learned trial judge held that the declarations that were made by Mr. Mason to his wife, under the statute, were privileged, but that there was a waiver of the privilege. Now it is contended for the first time that the communications were not privileged at all, and that,

as Wigmore declares, before communications of that character are privileged, the elements must exist to which reference is made in the brief of the defendant in error. Whatever may be the rule of the common law as to the nature of the communications to which the privilege of secrecy attached, there can be no question as to the extent of the privilege under a statute like ours.

In the case of.

People v. Mullings, 83 Cal. 138, 17 Am. St. Rep., 223, 23 Pac. 229,

the Supreme Court of California, considering a statute exactly like the Montana statute said:

> "The provisions of our Codes on the subject of privileged communications between husband and wife are little more than a declaration of the common-law rule upon the subject, except in this respect: the privilege at common law did not extend to communications which were not in their nature confidential; and although such communications were generally held to be confidential, yet some very difficult questions did occasionally arise as to the character of the communications; but our Code sweeps away that embarrassing distinction by extending the privilege to 'any communication made by one to the other during the marriage.' "

The Court then quotes the following declaration by Wharton:

> "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: (1) A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage."

And in approval of this declaration by Wharton, the court used the following language:

> "The rule is founded on public policy, and its purpose, as stated in the clause of the Code just quoted, is to 'encourage confidence, and preserve it inviolate;' and no disclosure can be forced from either spouse without the consent of the one against whom it is sought to be used."

The principle declared in the case of People v. Mullings, *supra,* has been repeatedly adhered to in California.

See the following cases:

In re Flint's Estate, 34 Pac. 863;
Falk v. Wittram, 52 Pac. 707;
People v. Warner, 49 Pac. 841;
Humphrey v. Pope, 82 Pac. 223;
People v. Loper, 112 Pac. 720.

See also:

Watkins v. Lord, 171 Pac. 1133;

Bassett v. United States, 137 U. S. 496, 34 L. Ed. 762.

It was suggested that the provisions of Section 7891 of the Codes of Montana equally with the provisions of Section 7892 were waived. The learned trial judge held that this section had no application at all to the facts in the case. If the court was in error, and the statute is applicable, the principle of waiver is not available, and equally is this true whether the statements are *res gestae* declarations or otherwise. The wife is a party to the instant action, and, under the provisions of the statute referred to, being a party, she cannot testify to any communications with a deceased person.

Respectfully submitted,

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